Supreme Court of the United States.

October Term, 1911.

The City of New York, *et al.*, Appellants, *against* William M. Barrett, as President of the Adams Express Company, etc.	No. 84.

Brief of Appellants.

Appellants, defendants in the Court below, likewise appeal from the Decree for the reasons, as specified in their Assignments of Error,

First—That the Court erred in finding and decreeing that sections 305 and 306 of chapter 7 of the Code of Ordinances of The City of New York are inoperative and void, as an interference with interstate commerce to any extent, and in enjoining the defendants herein from taking any action to compel complainants to take out a license under said sections, instead of construing said sections in connection with the other sections of the same Ordinance, held valid by the Court, and, as so construed, upholding said sections 305 and 306 as valid and constitutional enactments.

Second—That the Court erred in construing said Ordinances as purporting to require of the complainant a local license as a prerequisite to conducting an interstate express business in The City of New York.

Third—That the Court erred in granting an injunction restraining defendants from compelling complainant to take out a local license as a prerequisite to conducting an interstate express business in The City of New York, because it appears without contradiction that defendants have never attempted or threatened to require such a license and claim no right to require such a license.

Fourth—That the Court erred in holding and decreeing that said Code of Ordinances of The City of New York, so far as they require automobiles used in the express business and the drivers or chauffeurs thereof to be licensed, are inconsistent with and superseded by chapter 374 of the Laws of 1910 of the State of New York, and in granting an injunction restraining defendants from in any manner requiring additional licenses to be taken out under said Ordinances for such express automobiles and chauffeurs as hold licenses from the State of New York.

Fifth—And that the Court erred in granting any relief against the defendants, in not dismissing the bill of complaint for want of equity and in not dismissing it upon its merits.

Assignment of Errors, p. 192.

All of the necessary facts are set forth in our Brief in

Barrett *vs.* City of New York, No. 83.

argued and submitted herewith.

In support of their appeal the defendants urge the following:

POINTS.

I.

Sections 305 and 306 of the Code of Ordinances of The City of New York do not require the complainant to take out local licenses as a condition precedent to engaging in interstate express business.

These sections provide as follows:

> "Sec. 305. The following businesses must be "duly licensed as herein provided, namely, "public cartmen, truckmen, hackmen, cabmen, "*express men*, drivers, junk dealers, dealers in "second-hand articles, hawkers, pedlers, "venders, ticket speculators, coal scalpers, "common shows, shooting galleries, bowling "alleys, billiard tables, dirt carts, exterior "hoists and stands within stoop lines and "under the stairs of the elevated railroad sta- "tions.
>
> "Sec. 306. No person shall engage in or "carry on any such business without a license "therefor under a penalty of not less than "two dollars, nor more than twenty-five dol- "lars for each offense, and for the purposes of "this ordinance the term person shall include "any human being or lawful association of "such."

There is not the slightest reference to interstate commerce or an interstate business in either of these two sections. And why the learned Court below should have ruled that these two sections

> "are inoperative and void as an interference "with interstate commerce, so far as they pur-

"port to require complainant herein to take
"out a local license as a prerequisite to con-
"ducting its interstate express business in The
"City of New York,"

is something which we are unable to appreciate.

Final Decree, page 185.

From our point of view it makes no difference whether or not complainant is engaged in an interstate business. We do not pretend to interfere with that business nor attempt to regulate it. What we do say is that no person shall engage in the express business within the territorial limits of The City of New York unless and until he has been duly licensed.

If these Ordinances are within the legislative power of the City, as concededly they are, and if they are a valid exercise of its police power, as undoubtedly they are, then admittedly, under the doctrine enunciated by this Court in the

Minnesota Rate Cases, 230 U. S., 352, 402,

these Ordinances are not inoperative and void but are valid and binding.

II.

The Ordinances referred to, in so far as they require automobiles used in the express business, and the drivers or chauffeurs thereof to be licensed, are not inconsistent with, nor are they superseded by chapter 374 of the Laws of 1910 of the State of New York.

The statute in question is a general act and, as it provides (section 280), is exclusively controlling

> "1. Upon the registration, numbering and "regulation of motor vehicles, and the licens- "ing and the regulation of chauffeurs;
>
> "2. On their use of the public highways, "and
>
> "3. On the accessories used upon motor ve- "hicles and their incidents and the speed of "motor vehicles upon the public highways;
>
> "4. On the punishment for the violation "of any of the provisions of this article."

Section 288, which is entitled "*Local ordinances prohibited,*" provides, in part, that

> "Except as herein otherwise provided, local "authorities shall have no power to pass, en- "force or maintain any ordinance, rule or "regulation requiring from any owner or "chauffeur to whom this article is applicable "any tax, fee, license or permit *for the use of* "*the public highway,* or excluding any such "owner or chauffeur from the free use of such "public highway, excepting such driveway,

"speedway or road as has been or may be ex-
"pressly set apart by law for the exclusive
"use of horses and light carriages or in any
"other way respecting motor vehicles or their
"speed upon or use of the public highways;
"and no ordinance, rule or regulations con-
"trary to or in anywise inconsistent with the
"provisions of this article, now in force or
"hereafter enacted, shall have any effect; pro-
"vided, however, that the power given to local
"authorities to regulate vehicles offered to
"the public for hire, and processions, assem-
"blages or parades in the streets or public
"places, and all ordinances, rules and regula-
"tions which may have been or which may be
"enacted in pursuance of such powers shall
"remain in full force and effect; * * *"

In other words, this statute applies exclusively to the licensing and regulation of chauffeurs, etc. The City of New York could not compel a chauffeur to take out an additional chauffeur's license. But in those businesses, over which it can exercise control, it may compel any person who engages in one of those particular lines of business, to take out a license, and it can also provide that that particular business should be subject to certain local regulations. It is not the chauffeur who is again required to be licensed but the person, whether he be chauffeur or not, who engages in the express business. And that person is required to take out not an additional chauffeur's license but an express license. The distinction appears to be too obvious to require comment.

The same proposition was urged by the plaintiffs in the

Yellow Taxicab Co. *vs.* Gaynor, 82 Misc., 94; 143 N. Y. Supp., 279.

It was there claimed that The City of New York, in view of the passage of chapter 374 of the Laws of 1910, could not compel the chauffeur of a motor-driven vehicle, which was being used for public hacking purposes, to take out a hackman's license. But, needless to add, the Court gave it scant consideration.

III.

In view of the fact that the defendants made no claim that the taking out of a local express license was a condition precedent to the complainant's engaging in an interstate express business, there was nothing before the Court to decide.

Equity, under such circumstances, should not have assumed jurisdiction. The defendants did nothing which was either the subject of complaint or the cause of any grievance on the complainant's part. We submit, therefore, that it was error to refuse to dismiss the bill of complaint against the defendants.

IV.

So much of the Decree as awards any relief to the complainant against the defendants should be reversed, and the Bill of Complaint should be dismissed.

Dated New York, November 3, 1913.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1913.

Nos. 83 and 84.

WILLIAM M. BARRETT, as President of the Adams Express Company, etc.,
Appellant,

v.

THE CITY OF NEW YORK, *et al.*,
Appellees.

THE CITY OF NEW YORK, *et al.*,
Appellants,

v.

WILLIAM M. BARRETT, as President of the Adams Express Company, etc.
Appellee.

CROSS APPEALS FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE ADAMS EXPRESS COMPANY.

NOVEMBER, 1913.

WILLIAM D. GUTHRIE,
Counsel for Adams Express Company.

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CROSS APPEALS FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE ADAMS EXPRESS COMPANY.

STATEMENT.

This controversy comes before the court on cross appeals from a decree on final hearing of a suit in equity brought to restrain the enforcement against the Adams Express Company, an interstate carrier, of an ordinance of the board of aldermen of the City of New York, requiring licenses and license bonds, upon the ground that such ordinance, if applicable to interstate express companies, (1) constitutes an unlawful interference with the right to carry on interstate commerce, (2) conflicts with the provisions of an act of Congress regulating the business of interstate express carriers, and (3) denies to express

companies the equal protection of the laws. The learned court below held that part of the ordinance was unconstitutional because plainly an attempted regulation of interstate commerce, but that the part requiring a license for every vehicle and payment of a license fee for every driver and vehicle and the giving of a bond for every vehicle used in the interstate express business were separable from the provisions which regulated the carrying on of the express business and were valid as local police regulations of the use of the public streets (record p. 184).

The ordinance constitutes chapter VII of part I of the Code of Ordinances of New York (Cosby's edition, 1910), and its pertinent provisions are set forth in paragraph VII of the bill of complaint (fols. 19–29; see also appendix to this brief). It provides that a number of businesses, including that of expressmen, shall be licensed (sec. 305), that no person under pain of a penalty shall engage in any such business without a license (sec. 306), that the Mayor shall have power to grant a license only to a citizen of the United States or one who has declared his intention to become a citizen, with power to suspend and revoke such licenses and punish violations thereof (sec. 307), that certain annual license fees shall be paid into the treasury of the City, and among others, $5 for each express wagon and 50 cents for each driver of any licensed vehicle (sec. 308), that every driver of a licensed vehicle shall be licensed, and that his application for a license shall be endorsed by two residents of the City testifying to his competence (sec. 315), that "every vehicle of whatever construction" used for the conveyance of packages and parcels within or through the City

of New York shall be deemed a public express, and its owner and every common carrier shall be deemed a public expressman (sec. 330), that every public express shall be marked with the word "Express" or "Exp." and with its official number (sec. 331), that every owner of a public express shall give a bond of $100 to the City of New York for each vehicle, conditioned for the safe and prompt delivery of property entrusted to the expressman (sec. 332), that the legal rates for carriage, in the absence of an agreement, shall be according to a table specified in the ordinance (sec. 333), that the Mayor shall have power to appoint license inspectors who shall regularly inspect licensed vehicles and places of business in order to see that the ordinance is complied with (sec. 374), that licensees shall exhibit their licenses upon demand, report any changes of residence or place of business, and perform the public duties of the business licensed (sec. 375), that various penalties shall be imposed for violations of the ordinance, and that any person engaging in or carrying on any business regulated by the ordinance without a license may be fined or imprisoned (sec. 379). Of these provisions, sections 305 and 306 were declared unconstitutional by the learned court below because affecting the business of interstate express companies, but the remaining sections, which merely effectuated the intent of these two fundamental sections, were adjudged to be valid.

The Adams Express Company is an unincorporated association organized under the laws of the State of New York, and William M. Barrett, the appellant in No. 83 and appellee in No. 84, is its President (fols. 5, 64, 94). The association is composed of many members, all jointly

interested in the present controversy, but they were not joined as parties below because their large number rendered such a course impracticable (fols. 6, 64). The statutes of the State of New York authorize such an association to sue and to be sued in the name of its president. Code of Civil Procedure, section 1919. The defendants, the Mayor and Police Commissioner of the City, were the municipal officers charged by law with the enforcement of the ordinance (fols. 8, 54). The ground of the jurisdiction of the court below, as a federal court, was that the suit arose under the Constitution and laws of the United States.

For nearly sixty years, since 1854, the Adams Express Company has been engaged in interstate commerce in New York City and elsewhere as a common carrier of packages and parcels (fols. 8, 64, 65, 97, 98).* The Express Company ordinarily collects shipments at the places of busi-

* The nature of the express business and its leading characteristics have been judicially declared in *The Express Cases*, 117 U. S. 1, 30, as follows:

"I am of opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

"While it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

"The object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

"It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it."

ness and houses of shippers (fols. 187, 188, 191, 192), transports them on fast passenger trains (fols. 150, 209), transfers them to its wagons on arrival (fols. 208, 291), and makes delivery to the consignees at their places of business or residences by use of such wagons (fols. 153, 154, 177, 178, 181). Promptness and speed are essential to the conduct of the express business (fols. 150, 210, 211, 291). The collection, transportation and delivery of packages follow each other in immediate succession and are all parts of the one continuous service (fols. 219, 290, 291). The company does not at any stage of its business interrupt the course of shipments by storage in a warehouse (fol. 290), nor has it facilities for warehousing goods (fol. 289). From the time a package is received by the company and until delivered to the consignee, it remains in the personal charge of one of its employees whether a driver of the wagon collecting or delivering it, or a messenger on a train (fols. 100, 101). As a high degree of honesty and care in the handling of the property entrusted to an express company is requisite, as well as knowledge of the schedules of rates and charges, the employees of the company, before being hired, must be and are carefully investigated (fols. 116, 354, 355, 357, 412–414) and bonded by the surety department of the company (fol. 508, *et seq.*).

The Adams Express Company daily receives directly from shippers in the City of New York thousands of packages for delivery to consignees in other states, and daily receives in other states thousands of packages for delivery to consignees in the City of New York (fols. 10, 65, 110). The average number of interstate shipments handled in the City is at least 50,000 daily (fol. 110), varying with

the seasons (fol. 110) and being the largest around Christmas (fol. 111). These packages contain money, gold, bullion, jewels, merchandise, documents, perishable goods, etc. (fols. 136–138, 140–144, 147–149, 151). The value of the merchandise carried cannot be estimated (fols. 134, 135) for the reason that a large portion of it is carried under an agreed valuation of $50 per shipment (fol. 135). The company at times carries hundreds of thousands of dollars in bullion (fol. 140), and millions in money (fol. 141). Sixty per cent. of the total bulk of the inbound matter handled by it in the City of New York consists of food and perishable freight (fol. 148), which requires the fastest possible transportation (fol. 149). The company also carries money for the Government of the United States between the City of New York and all points within the territory over which it operates (fol. 147). It transports these packages to and from the City of New York under through bills of lading which it issues in each case as the contract of carriage (fol. 219, exhibits 6, 7, 8), and it charges an indivisible through rate covering all services from receipt until actual delivery to the consignee, no separate charge being made for cartage, collection or delivery, or other terminal services (fols. 154, 155, 219).

The Adams Express Company operates in thirty states and in the District of Columbia, and over 94 railroad lines with a mileage of 32,994 miles, 13 electric lines with a mileage of 245 miles, 20 steamboat lines with a mileage of 3,304 miles and 15 stage and wagon lines with a mileage of 73 miles (fols. 101–107; exhibit 4, fol. 450). It employs 18,038 men, of whom 2,026 are employed in the New York department (fols. 111–112, 452, 453). This

department consists of New York City and Jersey City, the number of men employed in New York greatly exceeding the number employed in Jersey City (fols. 194, 367, 368). The company uses 341 wagons and 68 automobiles in connection with its business in the City of New York (fol. 507), and about half of its wagons are stabled in Jersey City (fols. 119, 507). In connection with these vehicles, the company employs 835 men as drivers, helpers and third men (fols. 351, 352, 507). These men and vehicles are indispensable instrumentalities of the company in the conduct of its interstate business (fols. 17, 66). The plant, wagons, facilities and real estate owned and used by the company represent an investment of the actual present value of $7,000,000 (fol. 114).

All shipments handled by the Adams Express Company between the City of New York and points north, south and west are made by way of Jersey City over interstate railroads running through the State of New Jersey and other states (fol. 176). These shipments are carried in wagons to and from the railroads, the wagons being ferried between New York and Jersey City (fols. 175-177.) Interstate shipments from the City of New York to points reached by way of Jersey City are collected by the company's wagons, carried to its district offices, there transferred to other wagons and then ferried to Jersey City, where the shipments are loaded on trains and carried to their respective destinations (fols. 175-177). Such of the shipments from other states through Jersey City as are addressed to consignees in the City of New York south of 59th Street are delivered directly to the consignees in wagons which are loaded in

Jersey City and ferried across the Hudson River from Jersey City, without further transfer and without being mingled with any articles carried wholly within the City or State of New York (fols. 177, 178). Shipments which come from Jersey City and which are consigned to addresses north of 59th Street in the City of New York are ferried from Jersey City, taken to district offices of the company, there assorted and transferred to other wagons, and then delivered to the consignees (fols. 178, 179).

Interstate shipments consigned to points east of the City of New York are transported by the New York, New Haven and Hartford Railroad Company and loaded on the cars of that road from the Express Company's wagons (fols. 181, 182). Shipments arriving over this railroad are transferred from the railroad cars to the company's wagons at the Grand Central Depot (fols. 179, 180), and those addressed to consignees below 59th Street are delivered directly and without further transfer (fol. 180), and those addressed to consignees above 59th Street are transferred to other wagons for delivery (fol. 213).

For the convenience of its interstate customers, and as an auxiliary to its interstate business, the Adams Express Company receives packages for transportation wholly within the City of New York (including the various boroughs), and also for transportation between the City and eight or ten points on the New York, New Haven and Hartford Railroad in the State of New York (fols. 122-124, 129). These intrastate shipments represent about one per cent. of the total business of the

company (fol. 121). The wagons of the company collect intrastate and interstate packages indiscriminately, and both species of business are carried on in the same manner and with the same instrumentalities (fols. 128, 132-134). No attempt is made to segregate the intrastate traffic from the interstate traffic, and such segregation would be impracticable because of the expense (fol. 134). The intrastate business of the company is so small that, if it were carried on separately, it would involve an expenditure far in excess of all that that branch of the business earns or can earn (fols. 125, 126, 276, 277). Such a separation would require a virtual duplication of the company's entire wagon equipment and wagon force in the City of New York (fol. 125), and would result in serious and unnecessary congestion of vehicles at terminals (fol. 126).

Although the ordinances of the City of New York have provided for more than fifty years, substantially as set forth in the present ordinance, for the licensing of expressmen, their vehicles and their drivers, and although during that entire period the Adams Express Company has been carrying on business in the City of New York and using the city streets, no attempt has ever been made to enforce against it the requirements of this ordinance (fols. 201–203), no demand has ever been made upon it for licenses or license fees (fols. 167–169), and its men have never before been arrested, or its wagons impounded, or its business molested, because not licensed (fols. 342, 343, 345, 361, 362). No bonds have at any time been demanded by the City or given by the company on account of its wagons (fols. 273–275). Neither the premises nor the wagons of the com-

pany have ever been inspected by the municipal authorities, and no attempt at such inspection has ever been made (fols. 275, 276, 374, 375).

The evidence showed that in 1902 the question of the power of the board of aldermen of the City of New York to compel expressmen engaged in interstate commerce to take out licenses was submitted to the Corporation Counsel of the City by the Chief of the Bureau of Licenses, and that he then rendered an official opinion (fol. 470, *et seq.*) in which he stated as follows (fols. 470, 474):

> "It seems to me that the imposition of a license fee and the prescription of rates, as far as they apply to an expressman who transports packages or other articles from Jersey City, or from any other point without the State, to The City or through The City. would be an attempt to regulate interstate commerce and would, therefore, be unauthorized. It has been decided by the Supreme Court of the United States and by the Court of Appeals of this State, that in the case of interstate transportation, the Legislature cannot prescribe the charge to be made for even that part of the transportation which is to be performed within the State. *Wabash R.R. Co.* v. *Ill.*, 118 U. S. 557; *Peo. ex rel. Pa. R.R. Co.* v. *Knight*, 171 N. Y. p. 357."

This opinion was acquiesced in by the City of New York and its officials until the occurrences hereinafter set forth.

In 1908, however, the Adams Express Company agreed with the Bureau of Licenses of the City of New York to take out licenses for a sufficient number of wagons to represent its purely local business, and forty was agreed upon as the number, and these forty licenses were from time to time renewed by the company, and it gave a bond for $4,000 to cover the forty wagons so licensed (fols. 273–275, 478–483). The number was fixed upon as more

than representing that part of the company's transportation which was confined to intrastate business (fols. 478–481). In fact, the number so agreed upon was really ten times the true proportion, for the local business is only one per cent. of the company's entire business in the City, and consequently four instead of forty wagons would have been the proper figure (fol. 121). This action on the part of the company was prompted solely by a spirit of compromise and for the sake of peace (fols. 478, 479). From the time that this agreement with the Bureau of Licenses was entered into until the strike of the Express Company's employees in October and November, 1910, nothing further occurred with respect to requiring licenses for the company's business, wagons, or drivers (fols. 167, 342, 343, 345, 361, 362).

The Adams Express Company is subject to the jurisdiction and regulation of the Interstate Commerce Commission under the act of Congress of June 29, 1906, 34 Stat. 584, c. 3591, and it has duly filed tariffs, fixed rates and otherwise complied with the Interstate Commerce Law (fols. 139, 144, 145, 151-153, 218-222). The rates or charges of the company referred to in the record or in this brief are the rates and charges under the schedules filed with the Interstate Commerce Commission. The extent and comprehensive character of the regulation by Congress are discussed *infra* at pp. 41-48.

On October 21st, 1910, employees of the United States Express Company made a demand upon that company's local agent at Hoboken in New Jersey for an immediate increase in wages (fols. 159, 160). The agent refused to comply with the request for want of authority to entertain

it, and a strike was immediately declared (*id.*). The drivers and helpers of the United States Express Company thereupon deserted their positions, and by threat and intimidation compelled the wagon men in other express companies, including the Adams Express Company, to join them in the strike (fol. 161). Rioting by the strikers promptly ensued, and great damage was inflicted upon the business and property of the Adams Express Company (fols. 160, 161, 502–503). Before the outbreak of this strike, practically none of the employees of the Adams Express Company was a member of the Teamsters' Union, a powerful and widely extended labor organization in the City of New York, but soon after its commencement about ninety per cent. of the wagonmen of the company joined that organization (fol. 216). The employees of the Adams Express Company abandoned their work without any prior notice, without any demand for higher wages or shorter hours, and without a grievance of any kind, solely out of sympathy with the strikers in the other companies and under the influence of fear and intimidation caused by these strikers (fols. 161–163, 218, 285, 286). Although the record does not disclose this fact, it was notorious that the rioting had caused maiming and death and that indictments and criminal trials were pending in the City of New York.

The reserve of employees, called the "extra list" maintained by the company was found to be entirely inadequate to meet the exigencies of this situation (fols. 286, 353–356). The company promptly advertised in ten of the leading New York daily newspapers for drivers and helpers and offered to pay good wages (fols. 286, 287,

340, 341). The advertisements were continued from October 28th until November 15th, which was one day prior to the termination of the strike, but they bore little fruit (fols. 288, 289, 349). Of twenty-five men who applied, only three seemed competent or desirable and were given application blanks to fill out, and only two were put to work (fol. 349). Existing conditions of intimidation rendered it impossible to find in the City of New York the large number of men required to operate the company's wagons (fols. 172, 286, 287, 349–351).

The ordinary teamster is quite unfit for such work (fols. 169, 170). Express service wagonmen are constantly entrusted with packages of great value (fols. 145, 146), and they have to solicit business and make contracts for the company (fols. 116–118). They must be men of integrity, intelligence and discretion (fols. 169–171). It is on that account that the company is compelled carefully to investigate before employing them (fols. 354, 355, 357, 411–417). These employees are continually called upon to fix the charges for carriage, and they must, therefore, have enough intelligence correctly to interpret and apply the complex and voluminous schedules of rates filed by the company with the Interstate Commerce Commission (fols. 117, 118, 152, 153, 169–171, 220–222). Indeed, an error resulting in charging too much or too little would expose the company to suit for unlawful discrimination, to penalties and to indictment (fols. 169–171).* In view of these special requirements, it is manifest that a large corps of competent and reliable wagonmen, numbering at least eight

* *United States* v. *Adams Express Company*, 229 U. S. 381; *New York Central R.R.* v. *United States*, 212 U. S. 481; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

hundred, cannot be hired in a short time or in one place (fols. 286–289, 304, 305). The practical experience of the Adams Express Company has shown that not more than three out of every ten men who apply can ordinarily be employed (fols. 401, 402).

The company, however, could call upon its offices out of town—in Philadelphia, Baltimore, Washington, Pittsburgh, etc.—temporarily to furnish wagonmen for the New York department (fols. 171–172, 305, 312, 313, 323, 324), and by bringing to New York a number of its skilled employees from each of these places, the company could have recruited an emergency force fit to be entrusted with the handling of its shipments, and capable of keeping its business moving, and thus the company could have avoided that utter paralyzation which finally overtook its business (fol. 158).

The City and its officials, however, upon the breaking out of the strike suddenly and for the first time demanded that the company take out licenses for all its wagons and drivers, and accompanied the demand with the threat that failure to procure such licenses would result in the arrest of its drivers and the impounding of its wagons (fols. 71–73, 204, 205). Even if the company had desired to comply with the City's demands, it found compliance practically impossible. The ordinance required that every applicant for a driver's license should be a citizen or have declared his intention to become a citizen and that his application should be endorsed in writing by two reputable *residents* of the City, testifying to the competency of the applicant (sec. 315), and the application blank (fols. 484–486) furnished by the

Bureau of Licenses required the endorsers to certify that to their knowledge the applicant was honest and industrious and a competent driver and to give the grounds of their belief and the sources of their information. It was, of course, improbable that any considerable number of men could be brought from cities a hundred or more miles away, who would be able to find in the City of New York two residents capable of certifying the competence of each of them of their own knowledge as required by the ordinance and the city authorities (fols. 158, 159, 172–174). Being domiciled in other cities and states, they would, in all human probability, be strangers in New York.

This interference by the City in the company's affairs compelled it almost completely to suspend its business in New York and to cease serving the public (fols. 158, 159). Without wagons with which to make collections and deliveries, the interstate express business could not be carried on (fols. 17, 66, 282, 283). Merchandise which kept constantly arriving in the City could not be delivered; it piled up in greater quantities than the company had facilities for guarding (fols. 208–210, 289–291, 339); the congestion at the depots, district offices, etc., grew daily, and the company was finally compelled to rent a pier in Brooklyn to which it moved some of its accumulated freight by floats (fols. 208–210). The perishable freight especially suffered, and this freight, to repeat, amounts to about 60 per cent. in bulk of the inbound traffic of the company (fol. 148). These shipments require prompt delivery, and a delay of 24 or 36 hours is enough to destroy or seriously impair their value (fols. 149, 280). Two or three carloads of perishable freight were entirely ruined and had

to be taken to the city dumping grounds and thrown away (fols. 212, 281, 289). Ten carloads had to be sold at forced sales, and several carloads were shipped back to the place of shipment (fols. 281, 282). Five hundred claims for damage or loss inflicted upon shippers by the company's inability to make deliveries had already been presented to the company at the time the present suit was being tried (fols. 212, 284), and the records in the correspondence bureau of the company indicated that the number of claims would finally be about two thousand (fol. 284). During the period of the strike, covering nearly three weeks, from October 27th to November 16th, 1910, the Adams Express Company lost over $350,000 in freight charges; but its total loss by reason of claims could not be shown at the time of taking testimony (fols. 165, 166).

The Adams Express Company did endeavor to make deliveries during the strike, but the city officials caused its wagons to be seized and impounded and its drivers to be arrested for want of licenses (fols. 71–73, 158, 159, 203, 205, 328–332). Three wagons belonging to the Company and actually engaged at the time in carrying interstate shipments (fols. 218, 219), were seized by the city police and taken to the corporation yards (fols. 224, 225, 241–243, 248, 249). One of these wagons was conspicuously marked with placards containing the words: "This wagon carries interstate commerce traffic only," which was the fact, but it was nevertheless seized and its driver arrested (fols. 203, 204). Two of these wagons were taken to a police station (fol. 421), and there the interstate freight on them was removed by the police into the station house, where it remained for three days

until the company was permitted to take it away (fols. 330, 331, 421, 422, 426). The horses attached to these wagons were put into private livery stables by the police (fols. 236, 237, 256, 427), and the company, in order to recover them, was compelled to pay for their board (fols. 239, 256, 496, 499). For example, to secure the release of two of its wagons from the pound, the company had to pay the City $15 for poundage (fols. 248, 249, 497). If the police and municipal authorities had deliberately intended to side with the strikers and to coerce the express companies, they could not have acted any more oppressively.

It was further proved that there were thousands of wagons and vehicles employed in other businesses which used the streets of the City in identically the same manner as did the wagons and vehicles of the express companies (fols. 257–259, 385–387); that these vehicles included, among others, those used by department stores, brewers, warehousemen, iron makers, grocers, coal dealers, builders, contractors and manufacturers (fol. 258); that none of them or their drivers were licensed, because no ordinance required them to be licensed (fols. 257–259); that many of these vehicles were larger and heavier and a greater menace to other vehicles and pedestrians in the streets than those belonging to express companies (fols. 273, 360, 380, 406), and that the wagons of the express companies were in all their essential parts similar to those used by the department stores, retail grocers and dry goods merchants (fols. 269–273, 322, 323, 359, 360, 377, 404–406), and about the same in weight, size, carrying capacity, height, space occupied on the streets, and in their running parts

and general character (fols. 359, 360, 377–380). It was also shown that these express wagons required no special attention from the police in charge of the traffic in the streets, and did not require any more care than other wagons (fols. 388–390), and in some instances required less (fols. 398–400). In fact, the total number of express wagons using the streets of the City of New York is only about one twentieth of the number of unlicensed wagons of similar kind to be found similarly using the city streets (fols. 258–259, 388, 407). The City expressly stipulated on the hearing that the number of vehicles of all sorts required to be licensed under the ordinances of the City of New York constituted but a small proportion of the total traffic in the streets (fol. 259).

The learned court below held that sections 305 and 306 of the ordinance, which require the licensing of the express business and forbid any one from engaging in that business without a license, were unconstitutional and void because "a person engaged in conducting an interstate express cannot be required by the local or state authorities to take out a local license as a prerequisite to conducting such interstate business in such locality" (p. 183), and, therefore, enjoined the enforcement of these two sections. But the court refused to enjoin the enforcement of the other sections of the same ordinance on the ground that they were separable and might be sustained as a police regulation of the use of the streets of the City of New York. The court also granted an injunction restraining the city officials from enforcing any of the provisions of the ordinance against the company's automobiles or chauffeurs because the state legislature had withdrawn

that subject-matter from the regulative powers of the City by chapter 374 of the laws of 1910 (rec., p. 184).

The complainant has appealed from the final decree in so far as it denied relief against the requirement in the ordinance of a license for all the Express Company's vehicles and men and a bond for all its vehicles employed in interstate commerce, and the City of New York has appealed from the decree in so far as it adjudged that sections 306 and 307 were unconstitutional and void as to interstate express companies and that the ordinance did not apply to express automobiles and their drivers. The complainant's assignment of errors may be briefly summarized as follows:

1. That the intent and purpose of the ordinance in question were to regulate the express business and to require licenses, license fees and bonds for the privilege of transacting that business in or through the City of New York, and that whilst wholly valid in all its provisions as a regulation of local or intrastate expressmen, it is unconstitutional and void as to interstate express companies.

2. That the ordinance is not severable, because it shows on its face that it was a regulation of the express business and not a regulation of the use of the streets by vehicles.

3. That even if the ordinance be severable and be deemed to show on its face that it was intended as a regulation of the use of the streets of the City of New York by express vehicles, it would nevertheless be void, because special and not general, as expressly required by section 50 of the Greater New York Charter, and because

denying to interstate express carriers the equal protection of the laws in that the ordinance does not apply impartially to all similarly situated and using the public streets in like manner.

It is proper to state that since the entry of the final decree now before the court, the authorities of the City of New York have not enforced the ordinance as against the interstate express companies, but have delayed doing so until the authoritative decision of this court.

I.

THE ORDINANCE NOW BEFORE THE COURT IS UNCONSTITUTIONAL AND VOID AS TO THE INTERSTATE EXPRESS COMPANIES BECAUSE IT REQUIRES THEM TO TAKE OUT A LICENSE, PAY LICENSE FEES AND GIVE BONDS FOR THE PRIVILEGE OF CARRYING ON INTERSTATE COMMERCE.

No principle of constitutional law is more firmly established than that no state or municipality can require any party to take out a license or pay license fees or give bonds for the right or privilege of carrying on any business in interstate commerce. It matters not how specious the pretext may be. This principle is, of course, particularly applicable to interstate common carriers whose business is actually regulated by Congress and under the jurisdiction of the Interstate Commerce Commission. As Mr. Justice Bradley said in *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, which involved a statute requiring interstate express companies or their agents to take out licenses for the privilege of carrying on the express business in the State of Kentucky:

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to

take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Leloup* v. *Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114."

See also *Brennan* v. *Titusville*, 153 U. S. 289, 302; *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 218; *Fairbank* v. *United States*, 181 U. S. 283, 306; *Stockard* v. *Morgan*, 185 U. S. 27, 33; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 162; *St. Clair County* v. *Interstate Sand & Transfer Co.*, 192 U. S. 454, 468; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 21; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 108; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215; *The Minnesota Rate Cases*, 230 U. S. 352, 401.

The proofs show beyond possibility of doubt that the service rendered by the drivers and wagons of the Adams Express Company in collecting and delivering packages in the City of New York is an inseparable part of interstate commerce, that all the men and wagons employed in such collection and delivery deal with interstate shipments, that the interstate business of the company is carried on by means of through contracts or bills of lading, that the charge for the service rendered by the drivers and wagons in every instance is not a separate fee or charge, but is included in the indivisible through rate charged for transportation from the point of receipt in one state to the point of delivery in the other, that the company's duty

and liability as a common carrier begins at the place of receipt of a package and terminates only at the place of delivery, and that it would be impractiable to carry on the business of interstate express carrier in any other way.

These facts convinced the learned court below (p. 175) that "the local transportation of interstate packages [is] interstate commerce, and so within the exclusive jurisdiction of the federal government." This ruling was in accord with controlling decisions. *Louisiana R.R. Comm.* v. *Tex. & Pac. Ry. Co.*, 229 U. S. 336, 341; *St. L. & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 161; *Texas & N. O. R.R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *United States* v. *Union Stock Yard*, 226 U. S. 286; *Ohio R.R. Comm.* v. *Worthington*, 225 U. S. 101; *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498, 526; *Galveston, H. &c. Ry. Co.* v. *Texas*, 210 U. S. 217; *Heyman* v. *Southern Railway Co.*, 203 U. S. 270, 274. See also *Jewel Tea Co.* v. *Lee's Summit, Mo.*, 189 Fed. 280, 281; 198 Fed. 532. In many of these cases, the service alleged to be intrastate commerce was performed wholly within a state, under local, as distinguished from through, bills of lading, and with interruptions that apparently divided the transportation into several intrastate transactions instead of a single interstate transportation; but, nevertheless, it was held that, as the property when shipped was destined for a point outside the state, the shipment constituted interstate commerce and that every part of its progress from one state to the other was of the same character. As Mr. Justice McKenna said in the *Louisiana* case (229 U. S. at p. 341):

> "The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which deter-

> mines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country."

In other words, the principle enunciated by this court is that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and covers and protects the shipment from the time it commences its transit by whatever means, local or interstate, until the termination of the shipment by delivery at the place of consignment. *The Daniel Ball*, 10 Wall. 557, 565; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 451; *American Express Co.* v. *Iowa*, 196 U. S. 133, 142; *Adams Express Co.* v. *Iowa*, 196 U. S. 147; *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, 559; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129.

It is true that it was once held by this court in *Osborne* v. *Mobile*, 16 Wall. 479, that an ordinance requiring interstate express companies to be licensed before they could carry on their business in the City of Mobile was valid; but this ruling was recognized to be erroneous in the subsequent case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647, where the court, speaking of the earlier case, said:

> "In view of the course of decisions which have been made since that time [*i. e.*, since 1872], it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States."

The later case of *Crutcher* v. *Kentucky*, 141 U. S. 47, *supra*, is so analogous to the case at bar that it should be deemed conclusive. There a statute of Kentucky required the agents of interstate express companies to be licensed as a condition to their being permitted to do

business within the state. The statute provided that, before any express agent could be licensed, there should be filed with the state auditor a statement of the financial standing of the express company he was to represent, that such statement should show an actual capital of at least $150,000, that thereupon the auditor should issue a license to the express company's agent to carry on its business, and that a small license fee, namely, $5, should be paid by the agent or the company for the license. No bond was required as in the case at bar. It was contended on behalf of the State of Kentucky that this legislation was a valid exercise of the police power in that it was simply an attempt in good faith to protect the people of Kentucky from loss through the insolvency or dishonesty of foreign express companies. The state court had held that (141 U. S. at p. 51):—

> "The statute was enacted for the benefit of the citizens of the State, under which the auditor is required to have satisfactory evidence of the ability and solvency of the corporation to do that which it has undertaken to do by virtue of its act of incorporation. Those who intrust to its custody the transportation of their property are entitled to some security that its undertaking will be performed, and we find no law of Congress, or any constitutional provision, that would deny to the State the right to impose such a burden upon those who undertake the discharge of such responsible duties."

And counsel for the state reiterated the argument in this court (141 U. S. at p. 56). In fact, there was laid before this court in the *Crutcher* case every argument in favor of the police power that has been put forward in the case at bar to sustain the validity of the present ordinance except the argument as to the regulation of the use of the streets

by vehicles. Thus, the learned counsel for the City of New York urged in the court below that "the second great object of these ordinances is to secure the safety of goods entrusted to the drivers of these wagons by or for the citizens of the city, and to prevent fraud, as by the delivery of fictitious shipments and the collection of charges thereon." This court in the *Crutcher* case, speaking by Mr. Justice Bradley, then said (141 U. S. 57, 59):

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States. . . . But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

It was also argued in the *Crutcher* case, that the Kentucky statute should be sustained because the express company there before the court was engaged to a small extent in intrastate carriage, just as here we find the Adams Express Company doing a small local business, less than one per cent. of its whole business in or through the City of New York. But this court answered (p. 59):

> "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objec-

> tion that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such."

The doctrine of the *Crutcher* case has repeatedly received the unqualified approval of this court upon every point decided in it. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 19; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 108; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 215. In *International Textbook Co.* v. *Pigg*, Mr. Justice Harlan declared that the *Crutcher* case was "a case in point . . often referred to and never qualified by any subsequent decision." It will be noted that the principle of the *International Textbook Co.* case goes very much further than is necessary to condemn the ordinance now before the court, for Mr. Justice Harlan then said, in language peculiarly applicable to the case at bar (217 U. S. at p. 110):

> "It is true that the statute does not, in terms, require the corporation of another State engaged in interstate commerce to take out what is technically 'a license' to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers and files a 'statement' of the kind mentioned in § 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a *condition* upon a corporation of another State seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce."

Buck Stove Co. v. *Vickers*, 226 U.S. 205, is to the same effect.

In the *Western Union* case (216 U. S. at p. 37), the court reaffirmed the holding of the *Crutcher* case that an interstate carrier incidentally engaged in intrastate commerce was not for that reason subject to local regulations which directly burdened interstate commerce, and used the following emphatic language:

> "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land."

A strong analogy will be found in the Employers Liability Acts (35 Stat. 65, c. 149; 36 Stat. 291, c. 143). It must be clear that if the interstate express companies were within the scope and operation of that statute, every driver and every wagon employed in collecting and delivering intrastate shipments would clearly be engaged in interstate commerce, even though part of the service related to intrastate shipments. *Pedersen* v. *Del., Lack. & West. R.R.*, 229 U. S. 146; *St. L. & San Francisco Ry.* v. *Seale*, 229 U. S. 156. Within the principle of these cases, any rail-

road employee employed in collecting and delivering interstate shipments in carts or wagons would be engaged in interstate commerce. *Illinois Central R. Co.* v. *Porter*, 207 Fed. 311; *Jewel Tea Co.* v. *Lee's Summit, Mo.*, 189 Fed. 280; 198 *ib.* 532; *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321, 323.

The case of *People ex rel. Pennsylvania RR. Co.* v. *Knight*, 171 N. Y. 354, affirmed in 192 U. S. 21, is readily distinguishable. In that case the cab service to and from the Pennsylvania Railroad Company's ferry in the City of New York was distinct and separate from interstate commerce, and covered an entirely separate service and contract and was the subject of a separate charge. Judge Cullen, delivering the opinion of the New York Court of Appeals, emphasized this controlling feature as follows (171 N. Y. 356):

> "I insist, however, that the transportation for which the relator has been taxed is not interstate commerce. It is not rendered under any contract for transportation from a point within the state to a point without the state, or *vice versa*, but is solely a carriage between two points within the state under a separate contract. As pointed out by the Appellate Division, the use of the relator's cabs is not restricted to those who have previously secured transportation to or from some point on its railroad, nor is such use confined to travelers upon the railroad."

And this court likewise emphasized this feature. Thus, Mr. Justice Brewer, delivering the opinion of the court, said (192 U. S. at p. 27):

> "As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith."

An entirely different question from the one then passed upon by this court would have been presented if it had appeared that the cab service was customarily part of the through contract for transportation, and if it had been the established course of business of the railroad company to transport passengers from its terminal stations or ferries to their residences as part of a through service. In the case of the express company, however, the cartage is an integral, indivisible and indispensable part of the through contract which it enters into; and not only is it under legal obligation to perform that service, but no separate charge is made for it.

An attempt was made in the court below to distinguish the *Crutcher* case by the assertion that the matters required to be done by the statute in that case were required "as a condition of being allowed to carry on any business whatever in the State," whilst under the ordinance now in question "no conditions are imposed upon the Express Companies as to their right to do business in the State or City." There is no sound or substantial distinction. If the ordinance is valid, the right of the express companies to deliver and collect interstate shipments by means of wagons is absolutely dependent upon the conditions imposed by the ordinance that the companies shall take out city licenses both for wagons and for drivers and comply with the other requirements of the ordinance in order to be permitted to carry on an integral and inseparable part of interstate commerce. The distinction suggested is hardly even verbal, and it conflicts with the ruling made in *International Textbook Co.* v. *Pigg*, 217 U. S. 91. To declare, as does the ordinance before the court,

that no one shall engage in the express business unless his wagons and drivers are licensed and unless he pays license fees and gives a bond and that his failure to comply with any of these provisions shall expose him to penalties or imprisonment, or both, is certainly to impose conditions upon the right or privilege to engage in that business. As Mr. Justice Harlan said in the last cited case (at p. 111): "The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business." In their brief in the court below the defendants said: "No conditions are imposed upon the express companies as to their right to do business in the State or City. There is merely a regulation of their local instrumentalities locally employed in the transaction of such business." The statute in the *Crutcher* case was a similar regulation of the local activities and business of express companies' agents within the state, but it was nevertheless held void, because it sought to regulate an inseparable part of interstate commerce just as does the ordinance in the case at bar.

It should be appreciated by the court that if the present ordinance is valid as to interstate express companies, it is likewise valid as to all railroad, steamship and fast freight or forwarding companies, and that every railroad, freight, baggage and express car is included within the ordinance and must be licensed and bonded. The principle is at any rate comprehensive. The language of section 330 is as follows:

> "Every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels and other articles within or through the City of New

> York for pay, shall be deemed a public express, and the owner thereof shall be deemed a public expressman, and the term expressman shall be deemed to include any common carrier of baggage, packages, parcels or other articles within or through the City of New York."

If, therefore, the ordinance is valid as to interstate express companies, it will be equally valid as to all interstate carriers, and such carriers can then be required to obtain licenses, to pay license fees and to give bonds by any city, town, or village "within or through" which they may engage in interstate business in respect of "every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels and other articles." The very same arguments that are now urged in support of the validity of the present ordinance and its application to interstate express companies would support its validity and application to other carriers doing business in or through the City or State of New York.

The character of the defendants' proposition will best be appreciated if we state it in terms of its effect and final analysis. According to the defendants, every carrier engaged in interstate commerce, although regulated by Congress and subject to the jurisdiction of the Interstate Commerce Commission, can be compelled by every state or municipality in or through which it does business (1) to take out a license and pay license fees with respect to its employees and its vehicles, as so-called "local instrumentalities," for the privilege of engaging in or carrying on the business of interstate commerce; (2) to employ in each such state or municipality only such drivers, porters, station agents, etc., as the state or municipality

has licensed, and this class of persons, under defendants' reasoning, may include every person who renders any service in connection with the safety of the persons or property transported or who might perpetrate a fraud upon travellers, shippers or consignees; (3) to employ only citizens or those who have declared their intention to become such, and (4) to give a bond for every vehicle of whatever construction in an amount to be fixed in the discretion of each state or municipality conditioned for the safe and prompt delivery of the person or property intrusted to the carrier.

It is confidently submitted that no such interference with or regulation of an inseparable part or instrumentality of interstate commerce can be tolerated and that no case lends support to the existence of any such broad and overwhelming power over interstate carriers on the part of the states or their municipalities.

II.

THE PLAIN INTENT AND PURPOSE OF THE ORDINANCE IN QUESTION WERE TO REGULATE THE BUSINESS OF EXPRESS CARRIERS.

It has not been suggested by any one that the ordinance in question is in any respect invalid in its application to those local expressmen who hold themselves out as common carriers of goods from one part of the City or State of New York to another and who are engaged in that occupation. This business existed long before the organization of the interstate express companies, and it has long been licensed and regulated by municipal or state au-

thorities. As to these local expressmen, the ordinance constitutes a full and adequate regulation of their business, as authorized by section 51 of the Greater New York Charter. Thus constituting a regulation of the business of local expressmen under section 51 of the Charter, it is submitted that the same provision can hardly have an entirely different intent and seek to accomplish an entirely different purpose as to interstate express companies, and as to them become a mere regulation of the use of the streets under section 50 of the Charter and not a regulation of their business. If the ordinance be, as it plainly and unmistakably declares on its face, a regulation of the business of expressmen, it cannot be upheld as to interstate expressmen on the ground that parts of it might have been enacted if the board of aldermen had had a different intent and purpose in mind. It is the merest speculation to tear certain provisions from their context and argue that the board of aldermen of the City of New York *might* have passed such inappropriate regulations if it had intended to deal, not with the express business, but with the use of the streets of the City. And it is unreasonable to assume that, if the board had been regulating the use of the streets with a view to the safety of travel, it would have wholly failed to indicate that purpose or have singled out only a small class of drivers and wagons and exempted all others similarly situated and using the streets in like manner.

The ordinance shows on its face that its intent and purpose were to regulate *business* and nothing else, and that it could not have been intended as a regulation of the use of the streets of the City of New York. Thus article I of

title II is entitled "Business requiring a license;" section 305, which immediately follows this caption, provides that "the following *businesses* must be duly licensed as herein provided," and then proceeds to enumerate them, among which is that of expressmen; section 330 defines an expressman as a "common carrier of baggage, packages, parcels or other articles within or through the City of New York;" section 306 forbids persons to "carry on any such *business* without a license"; section 309 is concerned with the renewal of licenses "for any *business* enumerated above"; section 374 requires the inspection of "licensed vehicles and *places of business*"; section 375 commands the licensee to inform the authorities of "any change of . . . *place of business*," and to perform the duties of "the *business* licensed"; and finally, section 379 makes it a crime to engage in "any *business herein regulated* without a license therefor." Moreover, section 333, which purports to enact a schedule of rates and charges for express carriage, is, beyond all doubt, a regulation of the express business, for the right to fix prices is the most potent manifestation of the right to regulate any business; and Ordinance No. 440, approved May 22, 1899 (Ord., Res., etc., of Municip. Assem. 1899, vol. II, p. 204, et seq.), which codified and revised the license ordinances of the City of New York, and which, except for slight amendments, is the same as the ordinance complained of herein, is entitled "A general ordinance in relation to *business* requiring a license and the *regulation* thereof, in the City of New York."

These sections are all interdependent and treated as part of one entire and inseparable scheme. There is not only a constant reference to *business*, but a constant use of

the phrases "herein provided" and "this ordinance" (*e. g.*, secs. 305, 306, 307, 309, 374, 379), which is a most persuasive indication of the understanding that the matter dealt with in all the sections was but one thing, namely, the regulation of business. It is almost as plain and unambiguous as if the board of aldermen had expressly declared that all the sections of the ordinance were being passed under section 51 of the Greater New York Charter, which authorized "the *licensing and otherwise regulating the business of . . . expressmen*," and not under section 50, which alone relates to the use of the streets by animals and vehicles. *City of Detroit* v. *C. H. Little Co.*, 163 Mich. 444, 448.

The force of these contentions was appreciated by the learned court below, for it said (p. 183):

> "It may be taken for granted that when the group of ordinances contained in chapter 7 [of the New York Code of Ordinances] were enacted—if they were enacted as a single piece of legislation, which we may assume to have been the fact—the board of aldermen had primarily in mind the licensing and otherwise regulating certain specified businesses, included in the enumeration of section 51 of the Greater New York Charter (Laws 1901, c. 466). It is difficult to see how any one can read the first two sections without reaching this conclusion. Section 305 provides that 'the following *businesses* must be duly licensed, as herein provided'; and section 306 provides that 'no person shall engage in or carry on any such *business* without a license therefor' under certain specified penalties."

In considering the contention of the defendants that the ordinance is not a regulation of the express business and hence not a regulation of interstate commerce when applied to the interstate express companies, it is important to appreciate the history of the ordinance and its uniform prac-

tical and administrative construction. If not intended as a regulation of business, but merely of the use of the streets and protection against imposition or dishonesty, why was it not heretofore enforced as against the interstate express companies? The answer is that from the very beginning the municipal authorities have recognized that it was merely a regulation of business and as such inapplicable to interstate carriers. This long continued practical interpretation is most persuasive that the ordinance was intended and operated as a regulation of business and not at all as a regulation of the use of the public streets by express vehicles.

In varied forms and with occasional amendments, the same ordinance has constituted a part of the legislation of the City of New York for more than half a century. Provisions requiring the licensing of expressmen and express wagons first appeared in 1856 in William Kent's revision of the ordinances of the City of New York (pp. 498–499); and, as will be seen from the references collected in the margin,* they have reappeared in every subsequent revision.

Ever since its organization, nearly sixty years ago, the Adams Express Company has been using wagons in the streets of the City of New York, and has been employing drivers to take charge of and drive them and collect and deliver packages. Yet during all that period and prior

* D. T. Valentine's revision (1859), ch. 38, pp. 367–368; Shepard & Shafer's revision (1881), ch. 8, art. 39, pp. 250–252; Laird's revision (1894), ch. 8, art. 39, pp. 65–66; Percy & Collins' revision (1897), ch. 7, art. 11, pp. 83–85; Ordinance No. 440, approved by the Mayor, May 22, 1899. This last revisory ordinance, with slight modifications, is the one involved in the case at bar. See Cosby's Code of Ordinances (1910), note p. 68.

to the present controversy, the ordinance has not been enforced against it, and neither its premises nor its wagons nor its men have been inspected by the city authorities, nor have any of its wagons been impounded, nor any of its drivers arrested for failure to have a license. Until a few years ago, not a single wagon or driver of the company was licensed, and never until then was any demand or intimation made by any city official that the company must procure licenses for them.

This exceptionally extensive and long continued administrative or executive construction of such an ordinance cannot be ignored. It shows clearly that all those whose duty it was to enforce the ordinance read it as does the complainant, and construed it as did Corporation Counsel Rives in the opinion above quoted, namely, as a regulation of the express business. The weight to be given to such a practical interpretation has been again and again declared by the highest court of the State of New York, and this is a familiar doctrine in this court. Thus, in *Easton* v. *Pickersgill*, 55 N. Y. 310, 315, the court said:

> "General usage, indeed, long continued and hitherto unquestioned, has great force; and the practical construction of the law by so many public officers, though not given upon adverse litigation, has still much of the weight of judicial decision."

See also *Matter of Tiffany*, 179 N. Y. 455, 459; *City of New York* v. *N. Y. City Ry. Co.*, 193 N. Y. 543; *Grimmer* v. *Tenement House Dept.*, 205 N. Y. 549; *People ex rel. Werner* v. *Prendergast*, 206 N. Y. 405, 411; *Fairbank* v. *United States*, 181 U. S. 283, 307; *Studebaker* v. *Perry*, 184 U. S. 258, 268; *United States* v. *Sweet*, 189 U. S. 471, 473; *McMichael* v. *Murphy*, 197 U. S. 304, 312; *Komada* v. *United States*, 215 U. S. 392, 396.

During the course of this long continued and consistent practical construction, clearly evidencing that in the opinion of the officers of the municipality the ordinance regulated the express business and could not, therefore, be enforced against expressmen engaged in interstate commerce, there have been numerous revisions and re-enactments of the ordinance, either with no changes at all or with merely minor alterations. In 1899 (Ord. No. 440, approved May 22, 1899), the license ordinances were codified, and re-enacted in their revised form with but few and unimportant changes, and in 1906 all the ordinances of the City of New York were codified and re-enacted. Section 57 of the Charter provides for an annual compilation of the ordinances by the board of aldermen. It has been frequently decided by this court "that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction." *United States* v. *Hermanos y Compañia*, 209 U. S. 337, 339; *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *United States* v. *Falk*, 204 U. S. 143, 152; *New Haven R.R.* v. *Interstate Com. Com.*, 200 U. S. 361, 401. The same principle should apply to the adoption by a municipal legislature of the executive construction of an ordinance by repeatedly re-enacting it substantially in the form in which it was construed. *People ex rel. Outwater* v. *Green*, 56 N. Y. 466, 475; *Pouch* v. *Prudential Ins. Co.*, 204 N. Y. 281, 288.

If further evidence of the fact that the ordinance regulates the business of expressmen and not the use of the public streets were needed, it would be found in the attitude of the municipal authorities towards the express company's automobiles. As the proofs show, the chauffeurs of

the sixty-eight automobiles belonging to the Adams Express Company are all licensed by the Secretary of State (fols. 119, 269), and they hold their licenses under the so-called "Callan Law" of the State of New York (L. 1910, c. 374). This statute provides, section 288, that the "local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner or chauffeur to whom this article is applicable any tax, fee, license or permit for the use of the public highways, or excluding any such owner or chauffeur from the free use of such public highways, . . . and no ordinance, rule or regulation contrary to or in any wise inconsistent with the provisions of this article, now in force or hereafter enacted, shall have any effect." It would seem clear, therefore, that the ordinance now in question would be entirely inapplicable to the automobiles of the Adams Express Company, if the ordinance be regarded as a regulation of the use of the streets. In that aspect, the ordinance could not possibly be sustained because expressly forbidden by statute. Yet the municipal authorities of the City of New York and the defendants insist that the chauffeurs must take out licenses as drivers of express wagons, that a license fee of $5 must be paid annually and a bond given for each of the sixty-eight automobiles operated by the Adams Express Company. The court below adjudged the present ordinance to be in conflict with and superseded by the act of the legislature (p. 186), but the City has appealed from this part of the decree (p. 192). It must be evident that it is only because the present ordinance is a regulation of the business of expressmen that it can be made to apply

to express automobiles already licensed to use the public streets by the legislature itself. A local expressman using an automobile clearly would have to comply with the ordinance because of the indisputable power of the board of aldermen to regulate his business when confined to city or state limits. The action of the authorities in arresting or threatening to arrest the drivers of the Adams Express Company's automobiles licensed by the State and carrying interstate packages conclusively shows that they were not acting upon the theory that the ordinance was a regulation of the use of the streets. They were, of course, familiar with the Callan law, and they must have regarded the ordinance now in question as regulating the express business and, therefore, applicable to automobiles engaged in that business whether local or interstate notwithstanding any license from the state government to use the public streets.

It should further be noted that no question is presented of any attempt by the City of New York to separate and regulate the local business of the large express companies as distinguished from their interstate business. The ordinance applies to the *business* of express *"within or through"* the City (sec. 330), and includes the interstate as well as the local business of the express companies. Moreover, it has been interpreted and recently enforced by those charged with its enforcement as covering and intended to cover both local and interstate business. If it covers and includes both the local and interstate business of interstate express companies, then it must be declared wholly invalid. The court cannot remodel or reconstruct the ordinance so as to make it read as if its

operation were expressly limited to the wagons and drivers of the interstate carriers who are engaged in local business, and thus compel such carriers at prohibitive expense and inconvenience to separate the local from the interstate business. *Williams* v. *Talladega*, 226 U. S. 404, 419; *Illinois Central Railroad* v. *McKendree*, 203 U. S. 514, 529; *Allen* v. *Pullman Company*, 191 U. S. 171, 179.

III.

CONGRESS HAS LEGISLATED UPON THE SUBJECT COVERED BY THE ORDINANCE AND ITS LEGISLATION IS EXCLUSIVE AND SUPERSEDES ALL STATE REGULATIONS.

Assuming that it might have been proper for the City of New York to enact the present ordinance in the absence of federal legislation upon the same subject, there can be no doubt, in view of the comprehensive acts of Congress and the regulations of the Interstate Commerce Commission now covering express companies (34 Stat. 584; 36 Stat. 544), that the power of local authorities to license and regulate the business of interstate express companies can no longer be exercised. The right of a state or a city "to apply its police power to subjects under the exclusive control of Congress, but in regard to which Congress has been silent, ceases as soon as Congress acts on the subject and manifests its purpose to call into effect its exclusive power." *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444; *N. Y. Central*

R. R. v. *Hudson County*, 227 U. S. 248; *St. Louis, Iron Mt. & S. Ry.* v. *Edwards*, 227 U. S. 265; *Louisville & N. R. Co.* v. *Hughes*, 201 Fed. 727. This principle was admitted by the learned court below who said (p. 175):

> "Not only is the local transportation of interstate packages interstate commerce, and so within the exclusive jurisdiction of the federal government, but that government has actually taken control and regulated such business by express detailed provisions and by giving to the Interstate Commerce Commission very broad powers of regulation. See the Interstate Commerce Act as amended June 29th, 1906, and June 18th, 1910. . . . Whatever authority may be given by law to the local legislature to regulate business generally or to regulate the business of certain specified classes of persons, *qua* business, is inoperative to control a person engaged in interstate commerce, whose business is already regulated by federal law, since the business of such person is within the exclusive jurisdiction of Congress."

An examination of the Interstate Commerce Act as amended June 29, 1906, and June 18, 1910, will show how comprehensive and far reaching are the regulations which subject all interstate express companies to the provisions of that act and the jurisdiction of the Interstate Commerce Commission. In section 1, it is provided that (34 Stat. 584):

> "The term 'common carrier' . . . shall include express companies . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such

transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

The act of June 18, 1910, added the following among other provisions (36 Stat. 546):

"And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful."

Section 6 provides for the filing and publishing of schedules of rates by express companies, and compels them to state plainly the places between which property will be carried, the classification of freight and, separately, all terminal charges. Section 2 prohibits unjust discriminations and section 3 forbids undue preferences. Section 15 empowers the Interstate Commerce Commission to prescribe maximum rates. Section 20 imposes the duty of issuing a receipt or bill of lading for the carriage, and

renders the express company liable as carrier for any damage or injury to the property in the course of transportation whether by itself or by any other carrier. Failure to comply with the statute is punished by penalty, fine, imprisonment or enlarged liability for damages. Section 10 makes it a misdemeanor punishable by a heavy fine for one subject to the Act to charge a rate greater than that fixed in the published schedules. Under this act of Congress, the liability imposed upon the express company as carrier clearly and indisputably begins at the point of receipt of a package by wagon or otherwise and does not terminate until actual delivery to the consignee.

Congress has, therefore, legislated in detail in regard to the whole subject of transportation by express companies as common carriers, and has made it their duty to establish, observe and enforce just and reasonable regulations and practices affecting not only vehicles used in the shipment or carriage of express packages, but "all services in connection with the receipt, delivery, . . . transfer in transit . . . and handling of property transported," as well as in regard to all matters "relating to or connected with the receiving, handling, transporting, storing, and delivery of property . . . which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property . . . upon just and reasonable terms." It would be difficult to select more comprehensive language in which to cover the whole contract and legal duty and all the details and service of transportation by the express companies as common carriers from the beginning to the end of such transportation. The refusal or neglect of an express company to collect and

receive or deliver packages as heretofore would come within the purview of this legislation, and the imposition of a separate charge for collecting or delivering packages in the City of New York would be an attempt to impose a terminal charge required to be reported to the Interstate Commerce Commission and subject to its power of regulation.

The primary purpose of the ordinance in question was undoubtedly to regulate the business of express companies and their relations to consignors and consignees; but it is clear that Congress has itself occupied that field by the above legislation. The defendants contended below that one of the great objects of the ordinance was "to secure the safety of goods entrusted to the drivers of these [express] wagons . . . and to prevent fraud, as by the delivery of fictitious shipments and the collection of charges thereon." But the same subject is fully covered by sections 1, 6 and 10 of the Interstate Commerce Act, which treats with and comprehends every step and service "which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this Act," and the honest collection of charges is explicitly regulated by sections 6 and 10.

Section 375 of the ordinance requires expressmen at all times to perform their public duties; but section 1 of the Act of Congress makes substantially the same requirement. Section 333 of the ordinance prescribes a tariff of charges for expressmen; but that section is void as to interstate shipments. Section 332 of the ordinance requires every public expressman to give a bond to the City "for the safe and prompt delivery of all packages." Congress preferred to accomplish the same end by differ-

ent means, namely, by requiring the carrier to establish just and reasonable regulations and practices (sec. 1) and by imposing upon the initial carrier the duty of issuing a receipt and a liability for loss or damage occurring anywhere in the course of the transit (sec. 20). It should not rest with the City of New York to say that its regulations for the same purpose shall not be superseded because a procedure identical with its own was not adopted by Congress. Neither can the City urge that its regulations may stand, because Congress has not expressly prohibited them. A direct prohibition is not necessary. "Legislation of Congress in regard to matters of interstate commerce need not be inhibitive, but only to occupy the field, in order to supersede state statutes [or municipal ordinances] on the same subject." *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444.

It is, therefore, plain that Congress has taken jurisdiction of the general subject of the business of express carriers, and has prescribed extensive and comprehensive regulations to accomplish the very purposes sought to be accomplished by the ordinance now in question. As the court said in *N. Y. Central R.R.* v. *Hudson County*, 227 U. S. 248:

> "An assertion of power by Congress over a subject within its domain must be treated as co-terminous with its authority over the subject, and leaves no element of the subject to the control of the State."

In the case last cited it was argued (227 U. S. at p. 263) "that as the text [of the act to regulate commerce] only embraces railroad ferries and the ordinances were expressly decided by the [state] court below only to apply to persons other than railroad passengers, therefore the action by

Congress does not extend to the subject embraced by the ordinances." And a similar argument was made by the defendants in this case. But this court overruled the contention, saying (at p. 264):

> "As all the business of the ferries between the two States was interstate commerce within the power of Congress to control and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result."

As this decision well illustrates, it is not necessary that the congressional legislation shall be commensurate in scope and detail with the state legislation in order to oust the latter. This view is further illustrated in the carefully considered case of *Louisville & N. R. Co.* v. *Hughes*, 201 Fed. 727, 750, where the court, after reviewing a number of earlier decisions in which state legislation was held to have been superseded, remarked that "it will be observed that in none of these cases did the act of Congress expressly

declare an intention of occupying the whole field." See also *Mo. K. & T. Ry. Co.* v. *Fookes*, 40 S. W. 858, 859.

The ordinance now in question does not merely ordain rules to be observed by express companies in order to promote objects covered by the congressional enactments, but it seeks independently to achieve those very objects by prohibiting express companies from engaging in interstate commerce at all until licenses have been obtained from the local authorities, license fees paid and bonds given. That certainly amounts to a regulation of the express business "*qua* business," and hence under his own reasoning the learned court below should have held that the ordinance was "inoperative to control a person engaged in interstate commerce, whose business is already regulated by federal law" (p. 175).

IV.

The ordinance in question is not severable.

The learned court below conceded that it might be taken for granted that "the board of aldermen had primarily in mind the licensing and otherwise regulating certain specified businesses included in the enumeration of section 51 of the Greater New York Charter," adding that "it is difficult to see how any one can read the first two sections without reaching this conclusion" (p. 183), but it held that incidentally "regulations as to the use of the streets were adopted," that these incidental regulations were separable within the doctrine of *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54, and that the separated provisions could be enforced notwithstanding

the invalidity of the main and underlying intent and purpose of the enactment. In other words, it seems to have been the idea that although the underlying and controlling purpose and intent of the enactment had wholly failed as to interstate express companies (but not as to local expressmen), nevertheless the incidental might be given effect because it might have been enacted if a different purpose or intent had been in mind. It is submitted that the principle of severability relied on by the learned court below was inapplicable, for that principle only applies where the main purpose and underlying intent of a statute or ordinance is effectuated and where the court can conclude to its satisfaction that the provision would have been enacted if the portion which is illegal had been omitted. There is nothing to warrant the assumption that whilst the board of alderman clearly had in mind the regulation of the express business in enacting sections 305, 306, 333, 374 and 379, as authorized by section 51 of the Greater New York Charter, it had in mind an entirely different purpose and intent and was exercising an essentially different power under a different section of the Charter (50) in enacting sections 307, 308, 315, 330, 331 and 332 of the very same ordinance. It does not at all follow that the board of aldermen would have enacted the latter sections if it had appreciated that the main purpose or intent of its plan was beyond its power as to interstate express companies although fully within its power as to local expressmen. The court below, in enforcing these latter sections as against interstate express companies, gave effect to what was concededly incidental to the main purpose which had wholly failed as to interstate

expressmen although remaining in full force and effect as to intrastate expressmen.

Taking the scheme of the ordinance as an entirety, it must be manifest, if we may repeat for the sake of emphasis the argument under point I, that it was intended to be a regulation of business. From section 305, which reads, "the following businesses must be duly licensed as herein provided," down to section 379, which speaks of "this ordinance" and of "any person engaging in or carrying on any business herein regulated without a license therefor" the board of aldermen is plainly dealing with businesses and not with the use of the streets. All the sections fit into a general scheme of business regulation. It cannot be that such an ordinance, thus showing on its face an intention to regulate business, can fail in that fundamental purpose as to interstate express carriers but nevertheless be sustained "simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

If all the sections of "this ordinance," to quote the legislative language, are valid as to expressmen not engaged in interstate commerce and as to them constitute an entire scheme and a valid regulation of their local express business, it is difficult to perceive how logically part of this entire scheme can be torn from its context and separated from the rest, and then upheld as to interstate expressmen on the theory that the separated part was not intended as a regulation of business at all but as a regulation of the use of the streets and a protection to other users of the streets.

This court has repeatedly pointed out the limit of the

rule of severability and the danger of attempting to enforce part of a statute or ordinance, and thus make by judicial construction an enactment which the particular legislative body did not make and might not be willing to make if the matter were again before that body. *Trade-Mark Cases*, 100 U. S. 82, 99; *Allen* v. *Louisiana*, 103 U. S. 80, 83; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 29; *Baldwin* v. *Franks*, 120 U. S. 678, 685; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 635; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Illinois Central R.R. Co.* v. *McKendree*, 203 U. S. 514, 529; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Employers' Liability Cases*, 207 U. S. 463, 501; *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, 97; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 113; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302; *Butts* v. *Merchants Transpn. Co.*, 230 U. S. 126, 133. As Mr. Justice Holmes recently said in *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302:

> "But we see no possible construction on which it [the statute] could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. . . . Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

V.

If the ordinance in question had been expressly drawn as a regulation of the use of the streets of the City of New York under section 50 of the Greater New York charter, it would nevertheless be invalid.

When such a legislative body as the board of aldermen of the City of New York undertakes to enact an ordinance under a specific section (50) of the Charter, which it intends shall operate as a regulation of the use of the streets of the City by vehicles, it is surely reasonable to expect to find on the face of that ordinance, or from its essential nature, that it is a regulation of such use. No such indication will be found in the ordinance now before the court. On the contrary, the only indication given by the board of its purpose or intent or the nature of the power which it was exercising is its declaration at the outset that it is dealing solely with a "business requiring a license" and "the granting and regulation of licenses."

Reference to section 50 of the Greater New York Charter, printed in the appendix, will show that it grants power to regulate the use of streets by foot passengers, animals or vehicles, and to regulate the speed of vehicles and the running of stages, omnibuses, trucks and cars, but that it does not grant any power whatever to require licenses for the use of the streets or to exact license fees or bonds for the privilege of using the streets. The ordinance now before the court in no sense regulates the use of the streets by vehicles or the speed of vehicles or the running of trucks. Not one word will be found covering any such subject. The requirement of a certificate of

two residents of the City testifying as to the competence of a driver (section 315) is silent as to the qualifications required and is as applicable to competence as an expressman as to competence as a driver. The Greater New York Charter in numerous instances deals with the subject of licenses and license fees, but it is entirely silent as to licenses or license fees for the privilege of using the streets of the City.* It has always been assumed that the board of aldermen could not exact a license fee for the use of the streets by any class of the public having the right to use the same. *City of New York* v. *N. Y. City R. Co., No. 1*, 138 App. Div. 131, 136; affirmed 203 N. Y. 593; *City of Chicago* v. *Collins*, 175 Ill. 445, 454; *Harder's Storage Co.* v. *Chicago*, 235 Ill. 58, 84.

The statute (section 50 relating to streets and their use) further provides as follows:

> "The board of aldermen shall not pass any special ordinance in relation to any of the matters mentioned in this section. All ordinances in relation thereto shall be general ordinances which may either apply throughout the whole city or throughout specified portions thereof, and shall provide for the enforcement thereof as specified in section forty-four of this act as amended," which provides for enforcement "by such fines, penalties, forfeitures and imprisonment as may by ordinance or by law be prescribed."

The present ordinance singles out a class or a few classes of users of the streets—a very small minority of such users—and requires them not only to be licensed and to pay license fees for the privilege of driving on the streets of the City of New York, but denies that privilege to all persons in this class who are not citizens or have not declared their intention to become citizens. The proofs show, and it is un-

*See, *e. g.*, secs. 50, 51, 343, 347, 348, 766 and 1472.

disputed, that the wagons of the express companies do not differ in character from innumerable other vehicles constantly using the streets of the City under identically the same conditions. The wagons of the express companies are in all their essential parts similar to those used by the department stores, retail grocers, dry goods merchants, etc.; and the total number of express wagons using the streets of the City of New York is only about one-twentieth of the number of unlicensed wagons of similar kind to be found similarly using the streets. Indeed, it was expressly stipulated (fol. 259) that the number of vehicles of all sorts required to be licensed under this ordinance constitutes but a small proportion of the total traffic in the street. The ordinance, therefore, is plainly special and not general, and as such violates the requirement of section 50 of the Charter, and in this respect fortifies the argument that the enactment was not under section 50 but under section 51 conferring power to regulate special businesses. The learned court below recognized this glaring inequality as follows (p. 180):

> "Obviously the ordinance is not of universal application; it does not require the drivers of all vehicles to be licensed after a certification as to competency. No doubt it would be a great boon to pedestrians who have to use the streets if such a measure of protection against reckless driving were secured to them, but this ordinance does not go to any such length. It deals only with a relatively small class of drivers. As we have seen the only carts which are required to be licensed are those used by their owners to transport the goods of other persons for pay (section 510). Inasmuch as all licensed vehicles are required to be conspicuously marked, a few hours' walk through the business thoroughfares of the city will give some idea of the relatively small

number of vehicles which are within the terms of the ordinances. All carts and trucks used by wholesale dealers, by building contractors, breweries, department stores and in a host of other employments—some of them of larger size and a greater menace than any operated by public cartmen or expressmen—are wholly without the purview of this ordinance."

But aside from the requirement of section 50 of the Greater New York Charter, requiring all ordinances for the regulation of the use of the public streets to be general and not special, it is submitted that the present ordinance conflicts with the prohibition of the Fourteenth Amendment that no state shall deny to any person the equal protection of the laws. As Mr. Justice Day said in the very recent case of *Barrett* v. *Indiana*, 229 U. S. 26, 29:

"The equal protection of the laws requires laws of like application to all similarly situated."

A law which applies only to one-twentieth of those using the streets with the same kind of vehicles in identically the same manner and to the same extent as the remaining nineteen-twentieths cannot possibly in any aspect be deemed a law of like application to all similarly situated. Nor can a law be deemed equal as to persons, within the sense of the constitutional mandate, which excludes resident aliens from its protection and declares, as in the case at bar, that they shall not be permitted to be licensed as drivers of wagons used in interstate commerce. Such a law is neither equal nor just and, in the constitutional sense, is purely arbitrary and discriminatory. The large number of aliens in the City of New York renders this provision particularly harmful.

It surely cannot at this date be necessary to cite the numerous cases in which this court has declared that aliens

are persons and entitled to the protection of equal laws, and that a law which does not apply to all alike under identical conditions is a violation of the guaranty of the equal protection of the laws. Mr. Justice Day, speaking for the court in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417, among other things said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559."

So far as the use of the public streets of the City of New York is concerned, the classification of express drivers in a separate class is purely capricious and arbitrary. The evidence conclusively shows that a driver of an express wagon uses the streets in no different manner from the driver of a similar wagon belonging to a grocer or a butcher or a department store or a dry goods merchant. No reason springing from or in any way suggested by the use of the public street can be pointed out for discriminating between them and placing them in a special class of licensed drivers. If the public is to be protected against unskilful and reckless driving, all similarly situated and driving similar wagons and similarly using the public streets under like conditions, should be included in the regulation. This court pointed out in the familiar case of *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*,

165 U. S. 150, 165, "that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

The suggestion made below by counsel for the City of New York that express wagons differ from other wagons in their use of the public streets in that they frequently have to stop and stand upon the streets and at times move very slowly, does not create any differences warranting the attempted classification. These characteristics, if true, might afford reason for an ordinance regulating speed or imposing a limit upon the time any wagon might stand in front of any one building, but would not warrant imposing a license fee for using the streets and exacting it only from a small class of users. It will, of course, be difficult for the court to perceive how the cause of public safety upon the public streets of a city could be advanced by requiring that drivers of slowly moving vehicles should be licensed whilst drivers of rapidly moving vehicles—certainly a greater menace to pedestrians and property upon the streets—were exempted from such requirement. As matter of fact, however, there is no proof before the court that would warrant the finding that express wagons occupy more of the public streets and move about more slowly than other wagons, such as the innumerable delivery wagons

of bakers, butchers, grocers, department stores, dry good merchants and others which make deliveries from door to door.

VI.

As to the police power of the several states.

It is true that this court has sustained the power of the states, in the absence of action and regulation by Congress, to enact reasonable police regulations and legal sanctions which indirectly affected interstate commerce. Examples of such state legislation will be found in such familiar cases as *Smith* v. *Alabama*, 124 U. S. 465; *Nashville etc. R. Co.* v. *Alabama*, 128 U. S. 96; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650; *Chicago etc. R. Co.* v. *Solan*, 169 U. S. 133; *Pennsylvania R.R. Co.* v. *Hughes*, 191 U. S. 477; *Martin* v. *Pittsburg etc. R.R. Co.*, 203 U. S. 284; *Atlantic Coast Line R.R.* v. *Mazursky*, 216 U. S. 122; *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S 406, and *Western Union Tel. Co.* v. *Crovo*, 220 U. S. 364.

In each of these cases, however, the provision in question related either to a subject not yet covered by any legislation of Congress, or created a sanction to secure the performance of the legal duties of common carriers. Many of these regulations belonged to that large class which it is competent for a state to make in the absence of legislation by Congress, but which are superseded as soon as Congress asserts its right to exercise exclusive power and to introduce uniform regulations (*Adams Express Company* v. *Croninger*, 226 U. S. 491, 500; *Kansas City*

Southern Ry. v. *Carl*, 227 U. S. 639, 649); and we have seen how comprehensive is the action of Congress in respect of the interstate express companies. Most of the remaining cases merely imposed additional sanctions and liabilities for acts done or omitted in order to compel and secure the performance of the public service companies' natural duties in respect of such matters as negligence, failure promptly to deliver messages, etc.

Without attempting to discuss and distinguish the numerous cases cited on behalf of the defendants, it is deemed sufficient to state with confidence that no decision since *Crutcher* v. *Kentucky*, 141 U. S. 47, sustains the proposition that a state may require a license fee to be paid, a license obtained, or a bond given for the privilege of conducting in that state any essential part of the interstate business of a common carrier. The uniform holding, even before the Interstate Commerce Act and related legislation, has been that such a state law is unconstitutional "no matter how specious the pretext may be for imposing" the license requirement.

If the City of New York may require "every vehicle of whatever construction" belonging to interstate carriers and every driver employed by them to be licensed, so may every city, town and village throughout the country. We cannot repeat this thought too often. If the City of New York may require bonds to be given at the rate of $100 or more for each vehicle belonging to or used by a common carrier, so may every other city, town and village. If such license fees and bonds can be exacted from the interstate express companies before they will be permitted to carry on interstate commerce, then the same principle must be ap-

plicable to all interstate carriers, and similar license fees and bonds can be exacted from all the interstate railroad, telegraph and telephone companies.

The leading case of *Crutcher* v. *Kentucky* involved the alleged exercise of the local police power and may be taken as typical and illustrating the point now being discussed. The argument there was that the requirements of the statute and the imposition of the license fee upon interstate express companies constituted a mere local police regulation and not an interference with interstate commerce, because they were aimed in good faith at securing for the people of Kentucky honest and responsible express service; but the statute was unqualifiedly condemned by this court on the ground that it was unconstitutional. See also *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove Co.* v. *Vickers*, 226 U. S. 205. Take another leading case, that of *Smith* v. *Alabama*, 124 U. S. 465, which indisputably involved a police regulation. There an act of the state legislature requiring locomotive engineers to be examined and licensed was upheld because it affected interstate commerce only indirectly, incidentally and remotely; but the enactment did not require the railroad to take out a license for the privilege of carrying on the business of interstate transportation or to give a bond for each locomotive or car. If, in the case at bar, the ordinance had prohibited any one from driving a wagon in the City of New York "without first undergoing an examination and obtaining a license" as in the Alabama case, an entirely different question would be presented. In that suppositious case, if the prescribed qualifications for driving were reasonable

and impartially administered in respect of all similarly using the streets, they might be upheld as legitimate police regulations intended to secure the safety of the public streets, and as such applicable alike to all driving on the streets whether engaged in local or interstate commerce. But in the ordinance now before the court, no qualifications whatever are prescribed, and neither in its language nor in its practical administration is there the slightest standard by which any court can say that the regulations were or were not appropriate to a police regulation or for the protection of the public streets. No regulation so indefinite has ever been before the court or has ever been sustained as a reasonable and appropriate exercise of police power, and none which made the competence of those to be licensed wholly dependent upon the mere fact of citizenship or declaration of intention to become a citizen and the certificate of two residents. There is absolutely no requirement in the ordinance as to age or experience or physical health. Section 315 requiring a certificate as to "competence" is silent as to the nature of such competence, and in view of the subject matter and context may reasonably be interpreted as referring only to competence as an expressman and not at all to competence as a driver. Similarly there is no provision in the ordinance that at all refers to or regulates the size, weight, condition, state of repair or any other physical characteristic of the vehicles required to be licensed.

It was urged by the City of New York in the court below that the validity of the ordinance must be determined as though it had been enacted by the state legisla-

ture. We so concede. Assuming that the legislature had passed this very ordinance and had provided that interstate carriers such as express companies or railroads should take out a license for "every vehicle of whatever construction" belonging to them and should pay a license fee of $5 and give a bond of $100 for every such vehicle used in interstate commerce, can there be any doubt that such a law would be unconstitutional as a regulation of interstate commerce?

Or assuming that the legislature had enacted in the very language of this ordinance that drivers of vehicles owned by interstate carriers and used in the collection and delivery of interstate shipments must be citizens, and should not be licensed or permitted to use the public streets of any city, town, or village throughout the State unless the wagons they drove were licensed and bonded, whilst all other drivers, that is, nineteen-twentieths of those similarly using the streets, were exempted, would not such a law be unequal and plainly deny to interstate carriers the equal protection of the laws?

On the other hand, if the legislature had provided for examination and investigation as to age, experience and physical condition and had required all in the same class (*e. g.*, all drivers of automobiles or all drivers of vehicles drawn by horses) to submit to examination and to be licensed, we should then have a general police regulation fairly appropriate to securing safety of limb and life on our highways and reasonably within the local police power. Such a law impartially administered might be upheld within the doctrine of *Smith* v. *Alabama*; but the present enactment is not such a law.

The court will not fail to note that a different question

would be presented if the ordinance before it were general and not special—if on its face it sought to secure safe and competent drivers—if it did not exact a license fee and a bond for the privilege of using the public streets for a legitimate business—and if it did not attempt to exclude those persons who were not citizens from the use of the streets. The express companies need not challenge the power of the legislature directly or through the board of aldermen to regulate the use of streets by vehicles and to require that drivers of all business vehicles shall be of a certain age and be otherwise competent to drive horses or power vehicles. Such an ordinance, general, reasonable and fair in its provisions, might be valid if it did not directly interfere with interstate commerce. But under such an ordinance, the business of the express companies would not be so completely at the mercy of its employees as it is or would be today under the operation of the existing ordinance. A general ordinance requiring all drivers of similar vehicles to be licensed would increase the number of available licensed drivers twenty-fold and would include resident aliens of whom there are such a very large number in all our cities. Instead of creating a limited class of specially licensed express drivers, who by combining and striking at any time could paralyze the commerce of a great city, as in the case at bar, practically every competent driver in the City would be available as an express driver for immediate service in any emergency. The position of the express companies would have been very different in November, 1910, during the strike of their employes if they could have appealed to such a large class of licensed drivers. But even then the inability to

utilize their employes in other cities and transfer them to New York because they were not licensed, might at any time of strike and intimidation of New York residents render it practically impossible for the interstate express companies to handle traffic in or through any one of the innumerable cities of the country which saw fit to adopt a similar ordinance. Therefore, it should be sufficient to consider and condemn the particular ordinance before the court, reserving for future consideration and adjudication the question of the validity of an appropriate ordinance impartially applicable to all drivers of vehicles in a city when sought to be enforced against those engaged in interstate commerce.

It should be observed that the power to require the word "express" or any abbreviation and a number to be placed on express-wagons or any other similar requirement, such as registry, etc., is not challenged. Such provisions would in no way unreasonably interfere with the freedom of interstate commerce. The controversy is as to the right to require licenses and bonds and the payment of license fees as conditions precedent to the conduct of the express business "within or through" the City of New York.

VII.

The right to relief in equity.

It was contended by the defendants below that the trial court, as a court of equity, had no jurisdiction to enjoin criminal prosecutions which the defendants had brought or threatened to bring for violations of the ordinance, and that the Adams Express Company would suffer no

irreparable damage, inasmuch as it could pay the license fees and give the bonds under protest and thereby avoid all the consequences occasioned by its refusal to pay. This argument disregarded the uncontradicted evidence as to the difficulty of securing licensed drivers on short notice and also disregarded the fact that the ordinance excluded from license all drivers who were not citizens or had not declared their intention to become citizens however competent they might be. It further disregarded the fact that the burden of giving bonds annually aggregating $40,000 was not measurable by money damages.

Familiar authorities furnish a ready reply to the defendants' objections. *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 838; *Ex parte Young*, 209 U. S. 123, 161; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Western Un. Tel. Co.* v. *Andrews*, 216 U. S. 165; *United States Express Co.* v. *Hemmingway*, 39 Fed. 60; *Postal Telegraph-Cable Co.* v. *City of Mobile*, 179 Fed. 955, 960; *Simpson-Crawford Co.* v. *Borough of Atlantic Highlands*, 158 Fed. 372; *City of Hutchinson* v. *Beckham*, 118 Fed. 399; *Jewel Tea Co.* v. *Lee's Summit, Mo.*, 198 Fed. 532; *Southern Express Company* v. *Mayor of Ensley*, 116 Fed. 756, 761; *Kansas City Gas Co.* v. *Kansas City*, 198 Fed. 500, 510, and *Southern Ry. Co.* v. *City of Asheville*, 69 Fed. 359, 360, 361.

The case at bar is much stronger than any of the cases cited. If the City of New York were now to enforce the ordinance against the Adams Express Company, it would mean that all of the company's drivers and helpers—about eight hundred—would be arrested; and, of course, a separate proceeding would be required to determine the guilt or innocence of each driver. It would mean theoreti-

cally that the City could begin eight hundred suits against the company to recover a penalty with respect to each of these violations, and also that it could bring four hundred actions to recover for violations committed in using without licenses that number of express wagons. Under these circumstances, it cannot be doubted that the present suit avoids a multiplicity of actions.

The occurrences during the recent strike, which are detailed in the record and summarized in the above statement, furnish ample illustration of the irreparable character of the loss and damage and of the unavoidable multiplicity of legal proceedings which the enforcement of the ordinance must necessarily bring upon the company.

It ought always to be borne in mind that if the City of New York can compel the Adams Express Company to pay between two and three thousand dollars per annum as license fees for its wagons, drivers and helpers, and annually give bonds of $100 for each of its 400 wagons, or $40,000 in the aggregate, for the privilege of conducting its interstate business, the City may increase the fees and bonds at discretion, and that it would be an extremely difficult and delicate task for a court to say that the power, if it exists, had been abused. If New York City may exact license fees and bonds, so may each of the cities, towns and villages in and through which the express companies of the country do business, and an enormous burden can thereby be cast upon the business of interstate express carriers. These exactions might readily amount to a very large sum annually. The power to exact license fees and bonds is a power so akin to taxation that it may readily be used to destroy, or, at least, certainly to impede. Con-

ceding *arguendo* that the question of irreparable damage is doubtful—although it is difficult to perceive how this can be held on the present record—nevertheless is it the law that a court of equity must say to a litigant, who is clearly guaranteed by the Constitution of the United States absolute freedom in the conduct of his interstate business, that he must submit to all exactions, pay whatever is demanded and give any bond prescribed for the privilege of engaging in interstate commerce, because he can sue the officer compelling the payment, and recover at law the money paid and damages, perhaps only after years of litigation? Rights which are inviolate under the supreme law of the land ought not to be denied or impaired for however short a period. A ruling that the only remedy is at law would deny adequate and complete relief, and would be not only a reproach to any system of procedure, but would fritter away a constitutional guaranty of supreme importance and deprive the carriers of the whole country of reasonable and necessary protection. It would be adhering to the letter and disregarding the spirit of the equity rule. The vivifying principle of equity jurisdiction and procedure in such cases ever has been to grant relief because the remedy at law to sue to recover unlawful exactions or damages would be plainly inadequate and incomplete. It may be true that the Adams Express Company can afford to pay the present exaction in one or a few cities, but if similar licenses and bonds are required in the innumerable cities, towns and villages in which it does business, numbering six thousand, the burden may become too great and all its available working capital may be tied up in payments and in securing bonds.

But take the case of the smaller and poorer expressmen engaged in interstate commerce: the necessity for making payments under protest and tying up a large amount of their working capital in bonds might practically deny them the right to engage in interstate commerce. No court of equity has yet announced that relief by injunction will be denied if it thinks the complainant can afford to pay under protest, but will be granted if such a payment would be too burdensome or prohibitive in the case of those of limited means. The only sound rule is that states and municipalities cannot be permitted unduly to interfere even temporarily with interstate commerce by exacting license fees or bonds for the privilege of engaging in interstate commerce and carrying on interstate business. That privilege is a national right guaranteed to all by the Constitution of the United States; it is the most essential and beneficient of all our national rights, and its free exercise ought not to be permitted to be interfered with in the manner now complained of.

CONCLUSION.

For these reasons it is submitted that it should be adjudged that the ordinance in question is void as to interstate express carriers because interfering with the freedom of interstate commerce, and that the decree of the court below should be reversed in so far as it denied relief to the complainant.

New York, November 6, 1913.

WILLIAM D. GUTHRIE,
Of counsel for the Adams Express Company.

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SUPREME COURT, U. S.
FILED
NOV 10 1913
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1913.

Nos. 88 and 84.

WILLIAM M. BARRETT, as President of the Adams Express Company, etc.,
Appellant,

v.

THE CITY OF NEW YORK, *et al.*,
Appellees.

THE CITY OF NEW YORK, *et al.*,
Appellants,

v.

WILLIAM M. BARRETT, as President of the Adams Express Company, etc.
Appellee.

CROSS APPEALS FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO BRIEF OF THE ADAMS EXPRESS COMPANY.

NOVEMBER, 1913.

WILLIAM D. GUTHRIE,
Counsel for Adams Express Company.

Supreme Court of the United States.

OCTOBER TERM, 1913. Nos. 83 and 84.

WILLIAM M. BARRETT, as President of the Adams Express Company, etc.,

Appellant,

v.

THE CITY OF NEW YORK, *et al.*,

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THE CITY OF NEW YORK, *et al.*,

Appellants,

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WILLIAM M. BARRETT, as President of the Adams Express Company, etc.,

Appellee.

CROSS APPEALS FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

THE GREATER NEW YORK CHARTER AS AMENDED.

ORDINANCES; POLICE, HEALTH, PARK, FIRE AND BUILDING REGULATIONS; EXCEPTIONS.

§ 43. The board of aldermen shall have power to make, establish, alter, modify, amend and repeal all ordinances, rules, and police, health, park, fire and building regulations, not contrary to the laws of the state, or the United States, as they may deem necessary to carry into effect the powers conferred upon The City of New York by this act, or by any other law of the state, or by grant; and such as they may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, peace

and prosperity of said city, and its inhabitants, except so far as power is conferred by this act upon presidents of boroughs, the police, health, park and fire departments respectively to make rules for the government of the persons employed in and by said departments. Nothing in this section contained shall be construed to impair the powers conferred by this act upon the department of education; and except so far as the legislative power respecting the health, police, park, fire and building departments shall be conferred upon said departments respectively by the provisions of this act, and except that any modification of the existing rules, regulations and ordinances affecting any of the departments and all ordinances to be passed to govern the board of public improvements or any of the departments thereof, must originate with the department concerned, or with said board, and must be adopted or rejected by the board of aldermen without amendment. But nothing in this section or this act contained shall be construed to impair the power or control conferred by this act upon the board of estimate and apportionment with respect to the streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and all public grounds and waters which are within or belong to the city.

"ENUMERATION OF POWERS OF BOARD OF ALDERMEN NOT RESTRICTIVE; GENERAL POWERS; EXCEPTIONS.

§ 44. No enumeration of powers in this act shall be held to limit the legislative power of the board of aldermen except as in this act specifically provided and the board of aldermen in addition to all enumerated powers may exercise all of the powers vested in The City of New York by this act, or otherwise, by proper ordinances, rules, regulations and by-laws not inconsistent with the provisions of this act, or with the constitution or laws of the United States or of this state; and, subject to such limitations, may from time to time ordain and pass all such ordinances, rules, regulations and by-laws, applicable throughout the whole of said city or applicable only to specified portions thereof, as to the said board

of aldermen may seem meet for the good rule and government of the city, and to carry out the purposes and provisions of this act or of other laws relating to the said city, and may provide for the enforcement of the same by such fines, penalties, forfeitures and imprisonment as may by ordinance or by law be prescribed."

BOARD OF ALDERMEN TO REGULATE USE OF STREETS; BUT NOT SO AS TO AFFECT FRANCHISES.

§ 50. Subject to the constitution and laws of the state, the board of aldermen shall have power to regulate the use of streets and sidewalks by foot passengers, animals or vehicles; to regulate the speed at which vehicles shall be driven or ridden and at which vehicles shall be propelled in the streets; to regulate processions or parades occupying or marching upon any street; to prevent encroachments upon and obstructions to the streets and to authorize and require their removal by the proper officers; to regulate the opening of street surfaces for purposes authorized by law; to regulate the numbering of houses and lots in the streets and the naming of streets, except that it shall not be lawful to number or renumber any houses or to change the name of any street save between the first day of December in any year and the first day of May next ensuing; to regulate and prevent the throwing or depositing of ashes, garbage or other filth or rubbish of any kind upon the streets; to regulate the use of the streets for signs, signposts, awnings, awning posts, horse-troughs, urinals, posts for telegraph or other electric wires, and other purposes; to regulate street pavements, crosswalks, curbstones, gutter-stones and sidewalks; to provide for regulating, grading, flagging, curbing, guttering and lighting the streets; to regulate public cries, advertising noises, steam whistles, and ringing bells in the streets; to regulate the exhibiting of banners, placards or flags in or across the streets or from houses or other buildings; to regulate the exhibition of advertisements or hand-bills along the streets; and to make all such regulations in reference to the running of stages, omnibuses, trucks and cars as may be necessary for the convenient use and the accommodation of the streets,

piers, wharves or stations. Whenever the word 'street' or the plural thereof occurs in this section in shall be deemed to include all that is included by the terms 'street, avenue, road, alley, lane, highway, boulevard, concourse, public square and public place,' or the plurals thereof respectively. Whereever the word 'vehicle' or the plural thereof occurs in this section it shall be deemed to include wagons, trucks, carts, cabs, carriages, stages, omnibuses, motors, automobiles, locomobiles, locomotives, bicycles, tricycles, sleighs or other conveyances for persons or property. The board of aldermen shall not have power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same, nor shall they permit the erection of booths and stands within stoop lines, except for the sale of newspapers, periodicals, fruits and sodawater, and with the consent in such cases of the owner of the premises. The board of aldermen shall not pass any special ordinance in relation to any of the matters mentioned in this section. All ordinances in relation thereto shall be general ordinances which may either apply throughout the whole city or throughout specified portions thereof, and shall provide for the enforcement thereof as specified in section forty-four of this act as amended. Nothing herein contained shall be construed to prevent the board of aldermen from providing by special ordinance for the erection or maintenance on the streets or waters within The City of New York of fountains, public comfort stations, urinals, public baths, or other like structures maintained by the public authorities; for the establishment of which the said board is hereby empowered to provide. All general ordinances relating to authorized structures, encroachments or obstructions in or upon the streets or sidewalks by persons other than the authorities of The City of New York, or other public authorities, shall fix a definite license fee for every such authorized structure, encroachment or obstruction, according to the character, extent and duration thereof, and shall provide for the issuing of revocable licenses therefor, which shall be ac-

cording to an established form and shall be regularly numbered and duly registered as shall be prescribed by the board of aldermen. But no ordinance hereafter adopted or power hereafter exercised by the board of aldermen shall limit, apply to or affect any franchise, grant, contract or resolution in the nature of a franchise hereafter made, approved or authorized by the board of estimate and apportionment as in this act provided, or by the board of rapid transit railroad commissioners of The City of New York."

BOARD OF ALDERMEN; LICENSING AND REGULATING CERTAIN TRADES OR BUSINESS; DOG LICENSES, ETC.

§ 51. Subject to the constitution and laws of the state, the board of aldermen shall have power to provide for the licensing and otherwise regulating the business of dirt carts, public cartmen, truckmen, hackmen, cabmen, expressmen, car-drivers and boatmen; of boot-blacks; of pawn brokers, junk-dealers, keepers of intelligence offices, dealers in second-hand articles, hawkers, peddlers, vendors and scalpers in coal freights; of menageries, circuses and common shows; of bone boiling, fat rendering and other noxious businesses; and shall have power to regulate or forbid the keeping of dogs. The board of aldermen shall also have power to regulate the rates of fares to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles or other vehicles, and to compel the owners thereof to pay annual license fees. All ordinances in relation to any of the matters mentioned in this section shall be general, shall provide for the enforcement thereof in the manner specified in section forty-four of this act as amended, and shall fix the license fees to be paid, if any. All licenses shall be according to an established form, and shall be regularly numbered and duly registered as shall be prescribed by the board of aldermen.

CODE OF ORDINANCES OF THE CITY OF NEW YORK*
approved November 8, 1906
containing
All general ordinances in force January 1, 1910
together with
All ordinances and amendments passed from
January 1, 1906, to January 1, 1910
compiled and annotated by
ARTHUR F. COSBY
formerly assistant corporation counsel.

CHAPTER 7.

TITLE I.—BUREAU OF LICENSES.

§ 300. There shall be a Bureau of Licenses in and for The City of New York attached to the Mayor's office, with a principal office in the City Hall in the Borough of Manhattan, and a branch office in such other boroughs as may be deemed necessary and be designated by the Mayor of said city, for the purpose of issuing and recording all licenses authorized by resolution or ordinance of the Board of Aldermen or now in force in any part of said city. (Ord. app. Feb. 8, 1898, sec. 1, with verbal changes.)

§ 301. The Bureau of Licenses shall consist of a Chief of said Bureau, with such deputies and assistants as may be found necessary for properly carrying on the work of the Bureau, to be appointed and removed at pleasure by the Mayor of said city, and paid such compensation as shall be fixed and established by said Mayor. (Id., sec. 2.)

§ 302. All licenses issued by the Bureau of Licenses shall be according to an established form, printed with corresponding stub and regularly numbered, with suitable blank spaces for writing in the name and residence of the licensee, kind and class of license, location and privileges allowed, and amount of fee paid, all properly bound in book form. All such licenses shall be duly classified and recorded in suitable registers and fully indexed. (Id., sec. 3.)

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* Editions of this work are published annually, in which all the pertinent provisions of the ordinances in force in 1910 are identical, and a copy of this later edition has been filed in the library of the court.

§ 303. All licenses issued by the Bureau of Licenses shall be granted by the Mayor and duly issued upon regular application to the Bureau of Licenses. The registers of licenses shall be public records, and extracts may be certified by the Chief of the Bureau or the deputy or assistant in charge of a branch office, for use as evidence. (Id., sec. 4.)

§ 304. There shall be kept in the principal office of said Bureau and each and every branch office thereof a book recording consecutively each license as issued, showing its kind and class, whether new or renewed, name of licensee, regular number of blank form, and amount of fee received, day by day. A daily report showing all of above details shall be made by each branch office to the principal office. All moneys received each day shall be duly deposited in a designated city depository the following day. There shall also be kept in the principal office of said Bureau a book showing a statement of all licenses issued and fees received by said Bureau and its branches, tabulated by days, months and quarters of the year, and compiled annually. (Id., sec. 5.)

Title II.—The Granting and Regulation of Licenses.

Article I.—Business Requiring a License.

§ 305. The following businesses must be duly licensed as herein provided, namely, public cartmen, truckmen, hackmen, cabmen, expressmen, drivers, junk dealers, dealers in second-hand articles, hawkers, peddlers, venders, ticket speculators, coal scalpers, common shows, shooting galleries, bowling alleys, billiard tables, dirt carts, exterior hoists and stands within stoop-lines and under the stairs of the elevated railroad stations. (Ord. app. May 22, 1899, sec. 1.)

§ 306. No person shall engage in or carry on any such business without a license therefor under a penalty of not less than two dollars, nor more than twenty-five dollars for each offense, and for the purposes of this ordinance the term person shall include any human being or lawful association of such. (Id., sec. 2.)

Article II.—Licenses and License Fees.

§ 307. All licenses shall be granted by authority of the Mayor and issued by the Bureau of Licenses for a term of one year from the date thereof, unless sooner suspended or revoked by the Mayor, and no person shall be licensed except a citizen of the United States or one who has regularly declared intention to become a citizen.

The Mayor shall have power to suspend or revoke any license or permit issued under the provisions of this ordinance. The Mayor shall also have power to impose a fine of not more than five dollars or less than one dollar for any violation of the regulations herein provided, and to suspend the license pending payment of such fine, which, when collected, shall be paid into the sinking fund for the redemption of the city debt. (Id., sec. 3).

§ 308. The annual license fee shall be as below enumerated:

For each public cart or truck	$2.00
For each public hack coach	3.00
For each public hack cab	2.00
For each special hack coach	5.00
For each special hack cab	3.00
For each express wagon	5.00
For each junk shop dealer	20.00
For each dealer in second-hand articles	25.00
For each junk cart or boat	5.00
For each peddler using horse and wagon	8.00
For each peddler using push cart	4.00
For each peddler carrying merchandise	2.00
For each ticket speculator	50.00
For each coal scalper	250.00
For each common show	25.00
For each public shooting gallery	5.00
For each public bowling alley	5.00
For each public billiard table	3.00
For each dirt cart	1.00
For each general hoisting	25.00
For each special hoisting	1.00
For each fruit or soda water stand, or both	10.00
For each newspaper or periodical stand, or both, and in addition also fruit or soda water, or both	15.00

For each movable newspaper stand.....	1.00
For each newspaper and periodical stand, or both	5.00
For each chair of a bootblack stand.....	5.00
For each stand under elevated railroad stations	10.00
For each driver of any licensed vehicle.....	.50

(Id., sec. 4.)

§ 309. Any license, before its expiration or within thirty days thereafter, may be renewed for another term, upon payment of one-half the license fee above designated therefor.

All licenses in force when this ordinance takes effect for any business enumerated above may be renewed under the foregoing provisions regulating renewals of licenses hereunder issued. (Id., sec. 5.)

Article III.—Special Regulations and Rates.

I. Public Carts and Cartmen.

[§§ 310–314.]

II. Drivers of Licensed Vehicles.

§ 315. Every person driving a licensed hack, or express, shall be licensed as such driver, and every application for such license shall be endorsed, in writing, by two reputable residents of The City of New York, testifying to the competence of the applicant. No owner of a licensed hack or express shall employ an unlicensed driver under a penalty of ten dollars for each and every offense.

(Id., sec. 55, as amended by ordinance approved June 29, 1909.)

III. Public Hacks and Hackmen.

[§§ 316–326.]

IV. Public Hack Stands.

[§§ 327–329.]

IVa. Public Porters.

[§§ 329a—329k.]

V. Expresses and Expressmen.

§ 330. Every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels and other articles within or through The City of New York for pay, shall be deemed a public express, and the owner

thereof shall be deemed a public expressman, and the term expressman shall be deemed to include any common carrier of baggage, packages, parcels or other articles within or through The City of New York. (Ord. app. May 22, 1899, sec. 18.)

§ 331. Every public express shall show on each outside thereof the word "Express" or the letters "Exp.," together with the figures of its official number. (Id., sec. 19.)

§ 332. Every owner of a public express shall give a bond to The City of New York for each and every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the Mayor or Chief of the Bureau of Licenses, conditioned for the safe and prompt delivery of all baggage, packages, parcels and other articles or things entrusted to the owner or driver of any such licensed express (Id., sec. 20).

§ 333. The legal rates for regular deliveries, unless otherwise mutually agreed, shall be as follows in the city:

Between points within any borough—

Not more than five miles apart, each piece..... $0.40

Not more than ten miles apart, each piece..... 55

Not more than fifteen miles apart, each piece..... 75

Between points in different boroughs: One-half the above rates in addition.

Special deliveries at rates to be mutually agreed upon. (Id., sec. 21.)

VI. Junk Dealers.

[§§ 334–340.]

VII. Dealers in Second-Hand Articles.

[§§ 341–346.]

VIII. Peddlers.

[§§ 347, 348.]

IX. Ticket Speculators.

[§§ 349, 350. (Repealed, December 15, 1908.)]

X. Coal Scalpers.

[§ 351.]

XI. Common Shows.

[§ 352.]

XII. Shooting Galleries.

[§ 352.]

XIII. Bowling Alleys.

[§ 354.]

XIV. Billiard Tables.
[§ 355.]
XV. Dirt Carts and Cartmen.
[§§ 356, 357.]
XVI. Exterior Hoists.
[§§ 358–360.]

Article IV. Stands Within the Stoop Lines and Under Elevated Railroad Stations.
[§§ 361–372.]

TITLE 3.—GENERAL REGULATIONS AND COMPLAINTS.

§ 373. All license fees received by the Bureau of Licenses shall be regularly paid over to the City Treasury, except the license fees received from hackmen, dealers in junk and second-hand articles, and for stands within stoop-lines, which shall be paid into the Sinking Funds for the Redemption of the City Debt. (Ord. app. May 22, 1899, sec. 56.)

§ 374. The Mayor shall have power to appoint inspectors in the Bureau of Licenses to see that the provisions of this ordinance are fully and properly complied with; and all licensed vehicles and places of business shall be regularly inspected, and the result of such inspection shall be indorsed on the official license therefor, together with the date of inspection and the signature of the inspector, and all inspections shall be regularly reported to the Bureau of Licenses. (Id., sec. 57.)

§ 375. Every licensee shall have the official license and exhibit the same upon the demand of any person; and shall report within three days to the Bureau of Licenses any change of residence or place of business; and shall at all times perform the public duties of the business licensed when called upon so to do, if not actually unable. (Id., sec. 58.)

§ 376. All words, letters and numbers hereinbefore prescribed for licensed vehicles shall be shown permanently and conspicuously on each outside thereof in colors contrasting strongly with background, and not less than two inches high, as directed and approved by the Mayor or Chief of the Bureau of Licenses, and shall be kept legible and plainly visible at all times during the term of the license; and shall be obliterated or erased

upon change of ownership or expiration of the license; and no person shall have or use any vehicle with words, letters or numbers thereon like those herein prescribed for licensed vehicles without being duly licensed therefor. (Id., sec. 59.)

§ 377. Every licensed hackman, whenever with a hack or waiting for employment anywhere in The City of New York; every licensed peddler while peddling; every person while using a licensed junk cart or boat, and every licensed ticket speculator while acting as such, shall wear conspicuously on the left breast of the outer coat a metal badge, of a shape, size and style approved by the Mayor or Chief of the Bureau of Licenses, and furnished by said Bureau, having engraved or embossed thereon the official designation and number of the license, together with the words "New York City." (Id., sec. 60.)

§ 378. The Chief of the Bureau of Licenses, or Deputy Chief, shall have power to hear and determine complaints against licensees hereunder and impose a fine of not more than five dollars or less than one dollar for any violation of the regulations herein provided, subject to the approval of the Mayor, who shall have power to suspend the license pending payment of such fine. All such fines, when collected, shall be paid into the Sinking Fund for the Redemption of the City Debt. (Id., sec. 61.)

Title 4.—Violations.

§ 379. Except as hereinbefore otherwise provided, no person shall violate any of the regulations of this ordinance under a penalty of ten dollars for each offense. No such violation shall be continued under a penalty of one dollar for each day so continued. Any person engaged in or carrying on any business herein regulated without a license therefor, or any person violating any of the regulations of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof by any magistrate, either upon confession of the party or competent testimony, may be fined not more than ten dollars for each offense, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid; but such imprisonment shall not exceed ten days. (Id., sec. 62, as amended June 29, 1909.)

In the Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

William M. Barrett, as President of the Adams Express Company, individually and as a shareholder in the said company, suing on behalf of himself and all other members and shareholders of the said company,

Appellant,

against

The City of New York, William J. Gaynor, as Mayor of The City of New York, and James C. Cropsey, as Police Commissioner of The City of New York,

Respondents.

No. 83.

Respondents' Brief.

The appellant appeals from the Decree of the Circuit Court of the United States, Southern District of New York, entered on June 30, 1911, the Assignment of Errors being, in short, that the Court erred:

a. In denying a permanent injunction.

b. In refusing to hold that the Ordinances which are the subject of this controversy are

unconstitutional and void as an interference with interstate commerce.

c. In holding such Ordinances severable from certain other Ordinances "which it held "unconstitutional and void as an attempt to "regulate and interfere with interstate com- "merce."

d. In refusing to hold that so much of an Ordinance of The City of New York "as pro- "vided that any person engaging in or carry- "ing on the express business without a license "therefor shall be deemed guilty of a misde- "meanor," is unconstitutional and void.

e. In refusing to hold that certain Ordinances of The City of New York "constitute a "single and inseparable scheme of municipal "legislation whereby it is sought to regulate "and interfere with the interstate business of "the express companies."

f. In refusing to hold that certain Ordinances of The City of New York "constitute "an arbitrary and unlawful discrimination "against express companies, deny to them the "equal protection of the laws and deprive them "of their property without due process of "law" (pp. 188, 189).

Chief Judge Lacombe's opinion, delivered on the denial of the motion for a preliminary injunction, is reported, 183 Fed., 793.

The Pleadings.

The Amended Bill of Complaint, after setting up the necessary formal allegations, avers:

"IV.—The Adams Express Company is now, "and since its organization in the year 1854 "has been engaged in The City of New York

"and elsewhere in the business of interstate
"express as a common carrier of packages,
"parcels and other property between the sev-
"eral States under through bills of lading and
"at through rates. Said express business, by
"the necessities of commerce and the usages of
"those engaged in such transportation, has be-
"come known and recognized as distinct from
"the transportation of the large mass of
"freight usually carried by steamboats and
"railroads, and its object is to carry small and
"valuable packages rapidly and in such a man-
"ner as not to subject them to the risk of loss,
"damage or delay which would attend their
"transportation in company with heavy or
"bulky articles of commerce. The said Adams
"Express Company, in the conduct of its busi-
"ness, receives directly from shippers daily in
"The City of New York many thousands of
"small and separate packages for carriage and
"delivery to consignees at points and places
"in other States, and receives daily in other
"States many thousands of like packages for
"delivery to consignees in The City of New
"York, which packages contain merchandise,
"money, gold and silver bullion, jewels, deeds
"and other documents and papers, securities
"and other articles of great value, and also
"fruits, vegetables and other perishable ar-
"ticles, all of which require special care in
"transit in the charge of responsible agents and
"certainty and promptness of delivery. The
"number of interstate packages which the
"Adams Express Company carries to and from
"The City of New York averages more than
"seventy-five thousand daily. The said trans-
"portation of packages in interstate commerce
"to and from The City of New York is done
"by the Adams Express Company under the

"terms and conditions of a through bill of lad-
"ing, which it duly issues in each case as the
"contract of carriage, and at a through rate
"covering all services from the moment of re-
"ceipt until the moment of actual delivery to
"the consignee, including cartage in The City
"of New York. It also carries bonds, money
"and gold and silver bullion for the Govern-
"ment of the United States between New York
"and Washington, D. C. It transports all
"packages delivered to it by shippers in the
"custody of its own employees and agents, by
"its own wagons or in special railroad cars,
"and over railroads and by steamboats or other
"means of carriage specially provided by it,
"which instrumentalities form through routes
"for continuous transportation between the
"several States from shipper to consignee, and
"it delivers such packages directly to the con-
"signees at their residences, places of business
"or other designated addresses, or to connect-
"ing lines in case the consignees are beyond
"points reached by its own lines. Liability
"for loss, damage, or injury to property de-
"livered to and accepted by the said Company
"for interstate transportation, for which it
"has issued its bill of lading, is imposed by
"law upon it, whether such loss, damage or
"injury is caused by the Company during any
"part of the transportation or by any other
"carrier to which such property has been
"transferred for delivery.

"V.—The said Adams Express Company, as
"a common carrier, is subject to the provisions
"of the Act of Congress, approved February 4,
"1887, entitled '*An Act to regulate com-*
"'*merce*,' and the various acts amendatory
"thereof and supplemental thereto. By the

"said acts of Congress the Company is, among "other things, charged with the duty of pro- "viding and furnishing vehicles and all instru- "mentalities and facilities for the receipt, "shipment, transportation or delivery of "property upon reasonable request therefor, "and of establishing through routes and just "and reasonable rates applicable thereto, and "of filing with the Interstate Commerce Com- "mission and publishing schedules of rates, "which are subject to the approval and regula- "tion of the said Commission. The said ex- "press company carries on its interstate busi- "ness in the United States on the lines of "more than one hundred separate railroad "companies, besides steamboat and stage "lines; its interstate routes aggregate more "than thirty-six thousand miles in length, and "they extend into thirty States and the Dis- "trict of Columbia; it has established over the "said lines through routes, and has made and "filed with the Interstate Commerce Commis- "sion, and duly published, as required by law, "classifications and schedules of rates appli- "cable thereto, by which all of its interstate "business is governed, and it has duly com- "plied with all the requirements of the Inter- "state Commerce Act.

"VI.—The said Express Company is the "owner of a large number of horses and "wagons and other vehicles kept and used "by it in the many places in which it trans- "acts its business. In The City of New York "the said Company employs about two thous- "and men, and owns and uses about four hun- "dred and fifty wagons drawn by horses, re- "quiring the services of over four hundred "drivers, besides about ninety motor vehicles, "and all of these wagons and drivers are used

"and engaged in the interstate business of re-
"ceiving, transporting and delivering packages
"and articles shipped to or from or through
"other States. The said horses, wagons and
"other vehicles and the drivers thereof are
"necessary and indispensable instrumentali-
"ties of the Company in the transaction of its
"said interstate business, and without such
"horses, wagons and vehicles, and without
"drivers and other operators for the same, the
"transaction of the interstate business of the
"Company in The City of New York and other
"large cities would be impossible. The services
"rendered by said wagons and drivers in col-
"lecting and delivering packages in The City
"of New York are invariably part of the inter-
"state transportation and no separate charge
"is made therefor, but such services are in-
"cluded and absorbed in and covered by the
"through rate or charge aforesaid so duly
"made, filed and published in accordance with
"said Interstate Commerce Law.

"VII.—The Board of Aldermen of The City
"of New York, claiming to act under and by
"virtue of power conferred upon them by an
"act of the Legislature of the State of New
"York known as The Greater New York
"Charter, and particularly section 51 thereof,
"heretofore adopted a Code of Ordinances for
"The City of New York, and in and by chapter
"7 thereof, among other things, provided as
"follows:

"'Section 305. The following businesses
"'must be duly licensed as herein provided,
"'namely, public cartmen, truck men, hack
"'men, cab men, *express men*, drivers, junk
"'dealers, dealers in second hand articles,
"'hawkers, peddlers, venders, ticket specula-

" ' tors, coal scalpers, common shows, shooting
" ' galleries, bowling alleys, billiard tables, dirt
" ' carts, exterior hoists and stands within
" ' stoop lines and under the stairs of the ele-
" ' vated railroad stations.'

" ' Section 306. No person shall engage in
" ' or carry on any such business without a
" ' license therefor under a penalty of not less
" ' than two dollars, nor more than twenty-five
" ' dollars for each offense, and for the pur-
" ' poses of this ordinance the term person shall
" ' include any human being or lawful associa-
" ' tion as such.'

" ' Section 307. All licenses shall be grant-
" ' ed by authority of the Mayor and issued
" ' by the Bureau of Licenses for a term of one
" ' year from the date thereof, unless sooner
" ' suspended or revoked by the Mayor, and no
" ' person shall be licensed except a citizen of
" ' the United States or one who has regularly
" ' declared intention to become a citizen.'

" ' The Mayor shall have power to suspend
" ' or revoke any license or permit issued un-
" ' der the provisions of this ordinance. The
" ' Mayor shall also have power to impose a
" ' fine of not more than five dollars or less than
" ' one dollar for any violation of the regula-
" ' tions herein provided, and to suspend the
" ' license pending payment of such fine, which,
" ' when collected, shall be paid into the sink-
" ' ing fund for the redemption of the city
" ' debt.'

" ' Section 308. The annual license fee shall
" ' be as below enumerated:

" ' For each express wagon..... $5.'

" ' Section 315. Every person driving a li-
" ' censed hack, or express, shall be licensed

"'as such driver, and every application for
"'such license shall be indorsed, in writing,
"'by two reputable residents of The City of
"'New York testifying to the competence of
"'the applicant. No owner of a licensed hack
"'or express shall employ an unlicensed dri-
"'ver under a penalty of ten dollars for each
"'and every offense.'

"'Section 330. Every vehicle of whatever
"'construction, kept or used for the convey-
"'ance of baggage, packages, parcels and
"'other articles within or through The City
"'of New York for pay, shall be deemed a
"'public express, and the owner thereof shall
"'be deemed a public expressman, and the
"'term expressman shall be deemed to include
"'any common carrier of baggage, packages,
"'parcels or other articles within or through
"'The City of New York.'

"'Section 331. Every public express shall
"'show on each outside thereof the word "Ex-
"'"press," or the letters "Exp.," together
"'with the figures of its official number.'

"'Section 332. Every owner of a public
"'express shall give a bond to The City of
"'New York for each and every vehicle li-
"'censed in a penal sum of $100, with suffi-
"'cient surety approved by the Mayor or Chief
"'of the Bureau of Licenses, conditioned for
"'the safe and prompt delivery of all baggage,
"'packages, parcels and other articles or
"'things entrusted to the owner or driver of
"'any such licensed express.'

"'Section 333. The legal rates for regular
"'deliveries, unless otherwise mutually
"'agreed, shall be as follows in the city:

"'Between points within any borough—

"'Not more than five miles apart,
"'each piece $0 40
"'Not more than ten miles apart,
"'each piece 55
"'Not more than fifteen miles
"'apart, each piece 75

"'Between points in different boroughs—
"'half the above rates in addition.

"'Special deliveries at rates to be mutual-
"'ly agreed upon.'

"'Section 373. All license fees received by
"'the Bureau of Licenses shall be regularly
"'paid over to the City Treasury, except the
"'licence fees received from hackmen, dealers
"'in junk and second-hand articles, and for
"'stands within stoop lines, which shall be
"'paid into the Sinking Funds for the Re-
"'demption of the City Debt.'

"'Section 374. The Mayor shall have pow-
"'er to appoint inspectors in the Bureau of
"'Licenses to see that the provisions of this
"'ordinance are fully and properly complied
"'with; and all licensed vehicles and places
"'of business shall be regularly inspected, and
"'the result of such inspection shall be en-
"'dorsed on the official license therefor, to-
"'gether with the date of inspection and the
"'signature of the inspector, and all inspec-
"'tions shall be regularly reported to the Bu-
"'reau of Licenses.'

"'Section 375. Every licensee shall have
"'the official license and exhibit the same upon
"'the demand of any person; and shall report
"'within three days to the Bureau of Licenses
"'any change of residence or place of business;

"'and shall at all times perform the public
"'duties of the business licensed when called
"'upon so to do, if not actually unable.'

"'Section 379. Except as hereinbefore
"'otherwise provided, no person shall violate
"'any of the regulations of this ordinance
"'under a penalty of ten dollars for each
"'offense. No such violation shall be continued
"'under a penalty of ten dollars for each
"'day so continued. Any person engaging in
"'or carrying on any business herein regulated
"'without a license therefor, or any person
"'violating any of the regulations of this ordi-
"'nance, upon conviction thereof by any
"'Magistrate, either upon confession of the
"'party or competent testimony, may be fined
"'not more than ten dollars for each offense,
"'and in default of payment of such fine may
"'be committed to prison by such Magistrate
"'until the same be paid; but such imprison-
"'ment shall not exceed ten days.'"

Following these allegations are (fols. 30-42) averments with regard to Ordinances having been adopted by the Board of Aldermen of The City of New York which regulate the use of the streets of the City by wagons and vehicles, under which Ordinances no license fee is required to be paid; that there are many thousands of wagons and vehicles employed in businesses, other than the express business, which use the streets of the City "but which other wagons and vehicles and the "drivers thereof are not required to be licensed," and that "the number of vehicles belonging to "interstate express companies and engaged in in-"terstate transportation constitutes a small per-"centage of the total number of wagons or vehicles "using the streets in the City."

Additional allegations are then made setting forth and explaining the manner in which the Adams Express Company conducts its business and the methods employed by it. It is further averred as follows:

> "For several years last past, the Adams "Express Company under and by virtue of an "arrangement made by it with the Bureau of "Licenses of The City of New York has taken "out licenses for wagons and drivers to the "amount of about forty per annum and paid "licenses fees thereon, and such number was "agreed upon with said Bureau of Licenses as "representing the domestic business actually "done within said City and not its interstate "business, and the company has at all times "conformed to the ordinances of The City of "New York in respect of its domestic business, "notwithstanding the fact that such domestic "business was conducted by it as an inseparable part and auxiliary of its interstate business" fols. 43, 44).

Said Amended Bill of Complaint further avers as follows:

> "IX.—On or about the 27th day of October, "1910, a large number of drivers, wagon helpers and other employees of the said Adams "Express Company engaged in receiving, delivering and handling packages in The City "of New York, left its service without notice "and without having made any demand upon "the company of any kind whatever, and continued to absent themselves from its service, "having been induced thereto, as your orator "is informed and verily believes, by the interference of other persons not employed by or "in the service of the company, by threats and

"violent means of intimidation and by their "inability to secure due police protection. For "the transaction of its interstate business it, "thereupon, became necessary for the com- "pany to employ and seek to employ new dri- "vers for its wagons. In like manner, drivers "and other employees of other express com- "panies of The City of New York engaged in "interstate commerce left the service of such "companies and continued to absent them- "selves from such service, and it became neces- "sary for such other companies to employ and "seek to employ new drivers for their wagons. "The new drivers and other employees of the "Adams Express Company at work upon its "wagons engaged solely in interstate traffic in "The City of New York have been violently "assaulted by riotous mobs, and the said "wagons in some cases have been greatly dam- "aged, so that for several weeks the interstate "business of the said company was seriously "interrupted and could not be carried on with- "out the protection of the police of the City "of New York.

"X.—Your orator further alleges on informa- "tion and belief that the defendants, William "J. Gaynor, as Mayor, and James C. Cropsey, "as Police Commissioner of The City of New "York, have caused the arrest in the Borough "of Manhattan, in The City of New York, of "an unlicensed driver of the Adams Express "Company engaged in driving a wagon of the "said company used only in interstate trans- "portation, namely, in carrying merchandise "in transit from Jersey City, New Jersey, by "way of steamboat to Brooklyn and thence by "wagon to the consignee in the Borough of "Manhattan in the said city, on through bills

"of lading; that at the time of said arrest, the "said wagon was conspicuously marked with "placards containing the following words, to "wit: 'This wagon carries interstate com-"'merce traffic only'; that the said defend-"ants, the Mayor and Police Commissioner "aforesaid, have threatened to arrest other "unlicensed drivers of the said Adams Express "Company driving its wagons engaged in in-"terstate traffic and to enforce said ordinances "above set forth against the company and all "its drivers; that they have caused the seizure "and impounding of wagons of the said com-"pany engaged in interstate traffic on the "ground that the same were not licensed ac-"cording to the ordinances above quoted, and "have seized and impounded their contents, "being interstate shipments, and that they "have threatened to seize and impound other "wagons, claiming that such unlicensed em-"ployees in driving the said wagons violate the "said ordinances, and that the said unlicensed "wagons are used in violation of the said ordi-"nances, notwithstanding that such employees "and the wagons driven by them are engaged "in interstate transportation.

"Your orator further alleges that such ar-"rests of drivers of the said Adams Express "Company, as made and threatened, and the "seizure and impounding of its wagons en-"gaged in interstate traffic will wholly prevent "it from carrying on its interstate business "and from performing its duty as a common "carrier as required by the said Acts of Con-"gress, and that such acts are and such threat-"ened acts would be an unlawful interference "with the business and property of the com-"pany as a common carrier engaged in inter-

"state commerce, and will and would inflict "irreparable injury upon it to an extent which "it will be impossible to accurately estimate or "ascertain.

"Your orator further alleges that the value "of its said business in The City of New York "is more than the sum of ten thousand dollars "per day; that the injury to which the said "Adams Express Company will be subjected "by such threatened arrests and the consequent "interference with its business will be more "than ten thousand dollars per day in loss of "charges on interstate shipments, and that all "of the above alleged acts and doings of the "defendants are contrary to equity and good "conscience and tend to the manifest wrong, "injury and oppression of the Company and "of your orator in the premises, and the Com-"pany and your orator are without any suffi-"cient or adequate remedy at law in the "matters aforesaid" (fols. 48-54).

And the said Amended Bill of Complaint prayed for an injunction against the defendants, their agents, servants, officers and subordinates restraining and enjoining them

"from enforcing the said ordinances against "the said Adams Express Company, its "wagons, drivers and employees, and demand-"ing licenses therefor, and from arresting its "drivers or causing them to be arrested, and "from denying police protection to the drivers "and wagons of the Company for not comply-"ing with the said ordinances, and from other-"wise interfering with the said Adams Express "Company, its wagons, drivers and employees "engaged in interstate transportation" (fols. 56, 57).

The Answer to the Amended Bill of Complaint raised the issues herein by general denials (fols. 63-69) and it furthermore alleged:

> "That complainant has never been required "to conform to any tariff of charges or rates "prescribed by any municipal ordinance of The "City of New York as to any of complainant's "interstate business; and except that defend- "ants, upon information and belief, deny that "any contract or arrangement of any kind "was made between said Adams Express Com- "pany and the Bureau of Licenses of The City "of New York by which a specified number of "licenses was agreed upon as representing the "domestic business done within said City of "New York, as alleged in said amended bill "of complaint or otherwise" (fols. 69-70).

And the said Answer also averred as follows:

> "*Eighth*—Defendants admit that one or "more unlicensed drivers of unlicensed wagons "of the said Adams Express Company have "been heretofore arrested in The City of New "York for violation of said ordinances herein- "before referred to, and that defendants in- "tend to enforce the said ordinances against "said Adams Express Company and its driv- "ers as well as all other express men doing "business within the City in a due, orderly and "lawful way, and that defendants claim and "allege that said ordinances apply to the driv- "ers and wagons of said Adams Express Com- "pany notwithstanding the fact that such driv- "ers and wagons may be engaged in transport- "ing interstate shipments; but defendants "deny that they have seized and impounded or "threatened to seize and impound wagons of "said Adams Express Company and the con- "tents thereof, except that upon the arrest of

"the drivers hereinbefore referred to the "wagons driven by said drivers were removed "from the City streets to a place of safety and "there kept until same were delivered to and "removed by duly authorized persons acting "for said Adams Express Company, to whom "the same were delivered upon demand. De- "fendants admit that they intend to prevent "by all lawful means the use of unlicensed ex- "press wagons within the City and if neces- "sary to that end they intend to and will re- "move said unlicensed wagons from the streets "of the City to a place of safety where the "same with their contents will be safely kept "to be returned upon demand to said Adams "Express Company or its duly authorized rep- "resentative. Defendants further deny that "the threatened enforcement of said ordi- "nances will prevent said Adams Express "Company from carrying on its interstate "business or from performing its duty as a "common carrier, or that such acts and threat- "ened acts are or would be an unlawful inter- "ference with interstate commerce, or with the "business and property of said Adams Express "Company, or that the enforcement of such "ordinances will or would inflict irreparable "injury or any injury upon said Adams Ex- "press Company. Save as hereinabove ex- "pressly admitted or denied, defendants have "no knowledge of the truth of any other mat- "ter or thing alleged in said paragraph X of "said amended bill of complaint herein, and "pray that complainant may be required to "make full proof thereof, if the same is deemed "material."

The Facts.

It is not denied that the Adams Express Company is engaged in interstate commerce as the major part of its regular business. It transports goods from the City and the State of New York to points in many other states, and from points in such other states to the City and State of New York. It is also engaged in intrastate, or domestic, commerce, transporting goods from point to point within The City of New York, and from The City of New York to points within the State of New York and *vice versa*. This latter part of its business comprises an appreciable part of its entire transactions, its "local" and "intrastate" business amounting, according to the testimony of the plaintiff (fol. 121), to two per cent. of the total business done in the City. In the year 1910, the said total business comprised 18,250,000 pieces (fol. 110), and aggregated $8,906,038.58 (fol. 504).

The Ordinances in question (fols. 19-29) provide regulations for the control and government of the wagons and drivers of all expressmen, *without exception,* doing business within The City of New York.

There is, and can be, no objection to the application of such Ordinances to the "*local*" and "*intrastate*" business of the Express Company. The sole reasonable contention is that they are inapplicable and unenforceable in respect to such of its wagons and drivers as are engaged in "*interstate*" commerce. The Express Company paid to the City license fees for forty of the wagons used in its business at New York City (fol. 260, and Exhibits 10 and 11, fols. 478, 483), out of a total of 448 horse-drawn wagons and 92 automobile trucks (fol. 119).

In the month of October, 1910, a strike broke out among the employees of the United States Express

Company at Hoboken, N. J. (fols. 159, 161), which soon extended to the Adams Express Company's employees (fol. 162). This, of course, caused a great congestion of the business which was in hand.

As appears by the stipulations in the record (fols. 201, 205), the undisputed facts are as follows:

> "It is stipulated by and between the parties "that the Cosby's Code of Ordinances of The "City of New York shall be deemed to be in "evidence, and that any provisions thereof may "be referred to and used by either party, and "that the Ordinances contained in such publi- "cation were at the time of the commence- "ment of this suit, and still are, in full force "and effect.
>
> "It is stipulated by and between the parties "to this suit that although the Adams Express "Company has been employing drivers and "helpers and using wagons in the streets of "The City of New York in the course of the con- "duct by it of its interstate business for over "50 years, it has never been compelled by any "City officials acting under any statute, ordi- "nance or otherwise to take out a license or "licenses for the conduct of its interstate ex- "press business, or to employ only licensed "drivers for its wagons and vehicles used in "such interstate commerce or to conform to "any tariff of charges or rates prescribed by "any statute or municipal ordinance, and that "its wagons and drivers and helpers employed "by it and engaged in interstate business have "never been licensed in The City of New York, "except that for several years last past about "40 licenses for wagons and drivers have been "taken out by the Adams Express Company "and license fees thereon have been paid.

"It is further stipulated and agreed between "the parties that the defendants herein have "caused the arrest in the Borough of Manhat- "tan and The City of New York of a driver of "the Adams Express Company engaged in "driving a wagon of the said company used "only in interstate transportation (such "driver and wagon being unlicensed), namely "*such driver and wagon being engaged in car-* "*rying merchandise in transit from Jersey* "*City, New Jersey, to a point within The City* "*of New York on through bills of lading;* that "at the time of said arrest said wagon had con- "spicuously marked thereon the following "words, to wit: '*This wagon carries inter-* "'*state commerce traffic only,*' and that the "defendants, the Mayor and Police Commis- "sioner of The City of New York, have threat- "ened and intend to arrest other unlicensed "drivers of unlicensed wagons belonging to "said Adams Express Company, although en- "gaged in interstate commerce and to enforce "the ordinances set forth in the bill of com- "plaint herein against the company and all "its wagons and drivers."

Again, at folios 257 to 259:

"It is admitted between the parties, for the "purposes of this case, that there are several "thousand horse-drawn wagons and motor "vehicles which use the streets of The City of "New York, but which wagons and vehicles "and the drivers thereof are not licensed; that "The City of New York has never taken any "steps by ordinance or otherwise to compel "the licensing of such wagons and vehicles or "the drivers thereof; that such wagons and "vehicles are employed in other businesses "than that of expressmen or common carriers

"and are used in transacting for profit the "business of their owners; that included in "these wagons and vehicles are those employed "by department stores, brewers, warehouse-"men, iron makers, grocers, coal dealers, "builders, contractors and manufacturers; "that the total number of wagons and vehicles "of this class which are not licensed greatly "exceeds the number of wagons and vehicles "used in The City of New York belonging to "interstate express companies and engaged in "interstate transportation, and that the num-"ber of vehicles required to be licensed under "the existing ordinances of The City of New "York is small relatively to the total traffic in "the streets."

And again, at folios 428 to 437:

"It is stipulated and agreed between the "parties, for the purposes of this suit, but sub-"ject to correction before final hearing, that "the by-laws and ordinances of The Mayor, "Aldermen and Commonalty of The City of "New York were revised in 1838 and 1839, and "published by authority of the Common Coun-"cil in 1839.

"That the ordinances were again revised in "1856 and published by order of the Common "Council in the edition known as 'Kent's Edi-"'tion' and that such edition of 1856 contains "the first provision in the ordinances providing "for the licensing or regulation of express "wagons or express drivers."

"That the ordinances were revised in 1881 "and as so revised published by authority in "the edition edited by Shepard and Shafer.

"That the ordinances were revised in 1897 "and published by authority in the edition "edited by Percy and Collins.

"That the license ordinances were revised "in 1899, and as so revised appear in the "printed work entitled, Ordinances, Resolu- "tions, etc., passed by the Municipal Assembly "of The City of New York and approved by "the Mayor, published in two volumes and "printed by the Martin B. Brown Co., dated "1899, which publication shall be deemed in "evidence without being filed herein as an ex- "hibit and either party may refer thereto.

"And that there has been an annual revision "of the Ordinances of The City of New York, "from 1901 to 1910.

"It Is Further Stipulated and Agreed, for "the purposes of this suit, that any of the par- "ties hereto may refer on any hearing or appeal "in this suit to any of the ordinances pub- "lished in these several revisions as fully and "to all intents and purposes as if the ordi- "nances had been set out at length in the case, "subject, however, to objection upon the "ground of relevancy or materiality by either "party.

"It is also agreed that either party may "refer to the Revised Ordinances of 1894 as "edited by Laird.

"It Is Further Stipulated and Agreed by "and between the parties, for the purposes of "this suit, that the ordinances of the City of "Brooklyn were revised in 1857 and then pub- "lished by authority of the Common Council "of that city in an edition edited by Henry C. "Murphy; that the ordinances of the City of

" Brooklyn were again from time to time from
" 1857 to 1873 revised and published by author-
" ity of the Common Council in the edition
" edited by W. G. Bishop, and that the ordi-
" nances of said City of Brooklyn were again
" revised in 1888 and 1889 and published by
" authority of the Common Council in the edi-
" tion edited by Shanley and McTierney.

" The same stipulation as that in respect of
" the revisions of the ordinances of The City
" of New York was thereupon entered into be-
" tween the parties.

" It Is Further Stipulated and Agreed by
" and between the parties hereto, for the pur-
" poses of this cause only, that the wagon of
" the Adams Express Company seized on No-
" vember 9, 1910, at Canal street and West
" Broadway for a violation of the ordinances
" of The City of New York, in that it was be-
" ing used and operated as an express wagon
" without a license, which wagon was placed
" in the Corporation Yards at the foot of Riv-
" ington street, East River, has been delivered
" to the Adams Express Company upon its de-
" mand since the institution of this suit.

" That neither the Mayor nor the Police
" Commissioner of The City of New York di-
" rected or ordered that any express wagons
" should be held until called for by a driver of
" the Adams Express Company duly licensed
" to act as such, or until such wagon was duly
" licensed.

" That the Police Commissioner of The City
" of New York, *upon the seizure of the express*
" *wagons which were being used and operated*
" *as express wagons without licenses,* directed
" that said wagons should be delivered up to

"the Adams Express Company, or its duly au-
"thorized agent, upon demand and upon pay-
"ment of the proper charges, but said Adams
"Express Company was not notified of such di-
"rection until after the commencement of this
"suit.

"That defendant, William J. Gaynor,
"Mayor of The City of New York, and defend-
"ant James C. Cropsey, Police Commissioner
"of The City of New York, shall each be
"deemed to have been called as a witness on
"the part of the defendants herein and to have
"each testified that defendants do not claim
"the right to seize unlicensed wagons and hold
"the same until a license has been obtained
"therefor and until removed by a licensed
"driver of the express company, and that they
"have never claimed such right and have no
"intention of claiming or attempting to en-
"force any such alleged right, but that on the
"contrary defendants intend to and will de-
"liver to the owner thereof, on demand, any
"and all express wagons removed from the
"streets of the city upon the arrest of their
"drivers for violation of said ordinances in re-
"spect to licenses, *and that it is merely the*
"use of express wagons in the express business
"within the City in violation of said ordi-
"nances that defendants intend to prevent."

POINTS.

I.

The Ordinances in question were enacted under the authority of the provisions of the Greater New York Charter, and as so enacted have the force of law within the corporate limits of The City of New York.

The Greater New York Charter (Laws of 1901, chap. 466) provides as follows:

"Sec. 43. The board of aldermen shall have "power to make * * * all ordinances "* * * not contrary to the laws of the "State, or the United States, as they may deem "necessary to carry into effect the powers con- "ferred upon The City of New York by this "act, * * * and such as they may deem "necessary and proper for the good govern- "ment, order and protection of persons and "property, and for the preservation of the pub- "lic health, peace and prosperity of said city "and its inhabitants * * *."

"Sec. 44. No enumeration of powers in this "act shall be held to limit the legislative "power of the board of aldermen except as in "this act specifically provided and the board "of aldermen in addition to all enumerated "powers may exercise all of the powers vested "in The City of New York by this act, or other- "wise, by proper ordinances, rules, regulations "and by-laws not inconsistent with the provi- "sions of this act, or with the Constitution or "laws of the United States or of this State;

"and, subject to such limitations, may from "time to time ordain and pass all such ordi- "nances, rules, regulations and by-laws, ap- "plicable throughout the whole of said city "or applicable only to specified portions there- "of, as to the said board of aldermen may seem "meet for the good rule and government of the "city, and to carry out the purposes and pro- "visions of this act or of other laws relating "to the said city, and may provide for the en- "forcement of the same by such fines, penal- "ties, forfeitures and imprisonment as may by "ordinance or by law be prescribed."

"Sec. 50. Subject to the Constitution and "laws of the State, the board of aldermen shall "have power to regulate the use of streets and "sidewalks for foot passengers, animals or "vehicles; to regulate the speed at which "vehicles shall be driven or ridden and at "which vehicles shall be propelled in the "streets * * *."

"Sec. 51. Subject to the constitution and "laws of the state, the board of aldermen shall "have power to provide for the licensing and "otherwise regulating the business of dirt "carts, public cartmen, truckmen, hackmen, "cabmen. *expressmen*, car-drivers and boat- "men; of bootblacks; of pawnbrokers, junk- "dealers, keepers of intelligence offices, deal- "ers in second-hand articles, hawkers, ped- "dlers, vendors and scalpers in coal freights; "of menageries, circuses and common shows; "of bone boiling, fat rendering and other "noxious businesses; and shall have power to "regulate or forbid the keeping of dogs. The "board of aldermen shall also have power to "regulate the rates of fare to be taken by "owners or drivers of hackney coaches, car-

"riages, motors, automobiles or other vehi-
"cles, and to compel the owners thereof to pay
"annual license fees. All ordinances in re-
"lation to any of the matters mentioned in
"this section shall be general, shall provide
"for the enforcement thereof in the manner
"specified in section forty-four of this act as
"amended, and shall fix the license fees to be
"paid, if any. All licenses shall be according
"to an established form, and shall be regu-
"larly numbered and duly registered as shall
"be prescribed by the board of aldermen."

The Ordinances in question were passed in pursuance of such legislative authority, and

"municipal ordinances passed in pursuance of
"authority from the legislature have the force
"of law and are as obligatory as if enacted
"by the legislature itself."

City of Buffalo *vs.* New York, L. E. & W. R. R. Co., 152 N. Y., 276, 280;
Kittinger *vs.* Buffalo Traction Co., 160 N. Y., 377, 389.

II.

The Ordinances are a valid exercise of the police power of the municipality, which has been delegated to it by the State, and are reasonable and just.

From the earliest times in the history of our municipal government it has been customary to require that certain lines of quasi-public business,

which, seeking the public patronage, are planned and carried on for personal gain and profit, and which need more or less of governmental supervision and regulation, to pay a license fee for a temporary permit or "license" to do that which would not otherwise be permitted. No one will deny that the business of public cartmen, truckmen and expressmen are included within that class; nor will any one dispute that when the businesses, so licensed, are carried on wholly within the State, as a vast majority of them are, the Ordinances apply to them with all the force of law. It is only when the business is partly interstate and part intrastate that any question of the constitutionality of the Ordinances arises.

Nor will anyone negative the proposition that when the Board of Aldermen "deems" it "necessary and proper for the good government, order and protection of persons and property," it has the legislative authority to require an annual license fee for each express wagon, and that "every person "driving a licensed hack, or express, shall be li- "censed as such driver."

It is the contention of the appellant that, when one of its drivers is engaged in driving an express wagon through the City streets which is employed in interstate commerce, no license is required, under said Ordinances, either for the wagon or its driver. In discussing such a question there are certain fundamental principles which control, and certain rules of construction adopted by this Court which apply. Thus it has been generally held that the power of Congress to regulate interstate commerce is exclusive and that the State cannot legislate on that subject.

Covington, etc., Bridge Co. *vs.* Kentucky, 154 U. S., 204.

Western Union Tel. Co. *vs.* James, 162 U. S., 650.

It has also declared that the power of Congress is exclusive, and the State cannot interfere at all, whenever the subject of regulation is national in its character, or admits only of one uniform system or plan of regulation. But whenever the subject of regulation is of a local nature, and only incidentally affects interstate commerce, it is within the legislative power of the State, in the absence of conflicting national regulation of the same subject.

Robbins *vs.* Shelby County Taxing Dist., 120 U. S., 489, 492.
Western Union Tel. Co. *vs.* James, *supra.*
New York, N. H. & H. R. R. Co. *vs.* New York, 165 U. S., 628.
Lake Shore & M. S. R. Co. *vs.* Ohio, 173 U. S., 285.
At. & Pac. Tel. Co. *vs.* Philadelphia, 190 U. S., 160.
Missouri Pac. R. Co. *vs.* Larabee Flour Mill Co., 211 U. S., 612.

"The exact limit of lawful legislation upon "this subject cannot, in the nature of things, "be defined. It can only be illustrated from "decided cases by applying the principles "therein enunciated, determining from these "whether in the particular case the rule be "reasonable or otherwise."

Houston & Texas R. Co. *vs.* Mayes, 201 U. S., 321.

In line with this ruling it has been decided that any exercise of state authority in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution.

Athletic Coast Line *vs.* Wharton, 207 U. S., 328, 334.

But this Court has also ruled that, in the absence of legislation by Congress, the state may enact reasonable laws, under its police powers and "in pursuance of acknowledged state authority," which *indirectly affect* interstate commerce.

Reid *vs.* Colorado, 187 U. S., 137;
Asbell *vs.* Kansas, 209 U. S., 251.

For example, a statute prohibiting the use of stoves in passenger cars is a valid police regulation, though such cars are employed in interstate commerce.

New York, N. H. & H. R. Co. *vs.* New York, 165 U. S., 628.

Mr. Justice Harlan said, at page 631:

> "The mere grant to Congress of the power "to regulate commerce with foreign nations "and among the states did not of itself and "without legislation by Congress, impair the "authority of the states to establish such "reasonable regulations as were appropriate "for the protection of the health, the lives and "the safety of the people. * * * The statute "in question is not directed against interstate "commerce, nor is it within the meaning of "the constitution a regulation of commerce, "although it controls in some degree the conduct of those engaged in such commerce. So "far as it may affect interstate commerce, it "is to be regarded as legislation in aid of commerce, and enacted under the power remaining with the state to regulate the relative "rights and duties of all persons and corporations within its limits."

Again, an Alabama statute which required locomotive engineers to be examined and licensed was held to be a valid police regulation, and not uncon-

stitutional as a regulation of interstate commerce, even when applied to an interstate train.

Smith *vs.* Alabama, 124 U. S., 465.

Another Alabama statute requiring certain railway employees to be examined for color blindness and to be licensed, was upheld as a valid police regulation and held applicable to interstate trains in

Nashville, Chat. & St. L. R. Co. *vs.* Alabama, 128 U. S., 96.

An Ohio statute requiring a reasonable number of trains to stop at designated stations was held to be a valid police regulation even as applied to interstate trains; and it was further held that the police power of the state extends not only to provisions tending to promote the health, the morals and the safety of the public, but also to whatever promotes the public peace and convenience.

Lake Shore & M. S. R. Co. *vs.* Ohio, 173 U. S., 285.

See, also,

Hemmington *vs.* Georgia, 163 U. S., 299.

Patapsco Guano Co. *vs.* Bd. of Agriculture, 171 U. S., 345.

Olsen *vs.* Smith, 195 U. S., 332.

Ter. of New Mexico *vs.* McLean, 203 U. S., 38.

New York *vs.* Hesterberg, 211 U. S., 31.

In the light of the principles enunciated in these decisions, the Ordinances which are the subject matter of this controversy are certainly valid. They reasonably regulate matters which fall within the class of subjects which are under state control. They "promote the public peace and convenience" and they are "enacted under the power remaining with "the State to regulate the relative rights and duties

"of all persons and corporations within its limits." The "safety of the people" of The City of New York, and of their goods, is promoted by the requirement of a license for every express wagon and its driver. It is a regulation which tends directly to that end by the supervisory control it assumes over the acts and operations of all express drivers and of all express wagons. It prevents a horde of sharpers and thieves, in the guise of public expressmen, from preying upon the good citizens of the metropolis. Likewise the Ordinances tends to check any disposition on the part of a recognized licensed class to combine and extort unjust charges from the people.

It is pertinent to say, therefore, that far from directly regulating interstate commerce in those cases, where wagons and drivers of the Adams Express Company are employed in its interstate business, these Ordinances may be regarded as legislation in aid of such commerce; and this for the reason that, in the absence of legislation by Congress on these subjects, the Ordinances are of great assistance to such commerce by making its operation and conduct sure and certain both for the Express Company and the shippers. They aid the Express Company by giving its business the habiliments of official approbation; they protect the shipper by doubly insuring his shipments within the jurisdiction of the City government.

It does not seem probable that this Court, in view of its well known rulings, will now hold that these Ordinances, locally enforceable in a matter of acknowledged local authority, infringe upon the powers reserved to Congress in the commerce clause. There is in them not a direct regulation of, but only an indirect beneficial assistance to interstate commerce, a right long since recognized as remaining with the State in the absence of direct legislation on the subject by Congress. This propo-

sition was thus clearly and forcefully stated by Mr. Justice Hughes in

The Minnesota Rate Cases, 230 U. S., 352, 402:

"But within these limitations there neces-
"sarily remains to the States, until Congress
"acts, a wide range for the permissible exer-
"cise of power appropriate to their territorial
"jurisdiction although interstate commerce
"may be affected. It extends to those matters
"of a local nature as to which it is impossible
"to derive from the constitutional grant an
"intention that they should go uncontrolled
"pending Federal intervention. Thus, there
"are certain subjects having the most obvious
"and direct relation to interstate commerce,
"which nevertheless, with the acquiescence of
"Congress, have been controlled by State legis-
"lation from the foundation of the government
"because of the necessity that they should not
"remain unregulated and that their regulation
"should be adapted by varying local exi-
"gencies; hence, the absence of regulation by
"Congress in such matters has not imported
"that there should be no restriction, but rather
"that the States should continue to supply the
"needed rules until Congress should decide to
"supersede them. Further, it is competent for
"a state to govern its internal commerce, to
"provide local improvements, to create and
"regulate local facilities, to adopt protective
"measures of a reasonable character in the
"interest of the health, safety, morals and wel-
"fare of its people, although interstate com-
"merce may incidentally or indirectly be in-
"volved. Our system of government is a
"practical adjustment by which the national

"authority as conferred by the constitution is "maintained in its full scope without unneces- "sary loss of local efficiency. Where the sub- "ject is peculiarly one of local concern, and "from its nature belongs to the class with "which the State appropriately deals in "making reasonable provision for local needs, "it cannot be regarded as left to the unre- "strained will of individuals because Congress "has not acted, although it may have such a "relation to interstate commerce as to be "within the reach of the Federal power. In "such case, Congress must be the judge of the "necessity of Federal action. Its paramount "authority always enables it to intervene at "its discretion for the complete and effective "government of that which has been committed "to its care, and, for this purpose and to this "extent, in response to a conviction of national "need, to displace local laws by substituting "laws of its own. The successful working of "our constitutional system has thus been made "possible."

Again, at page 410:

"And the legislation of the States, safe- "guarding life and property and promoting "comfort and convenience within its jurisdic- "tion, may extend incidentally to the opera- "tions of the carrier in the conduct of inter- "state business, provided it does not subject "that business to unreasonable demands and "is not opposed to Federal legislation."

The appellant may contend that Congress has acted on the subject in the Interstate Commerce Act which includes express companies. That Act, however, contains no provisions or regulations upon the particular matters embraced within the

Ordinances. If the very general provisions of the Interstate Commerce Act were the only regulations now existing and enforceable against express companies in the conduct and operation of their interstate business, then indeed those companies would be left with a dangerously free hand within the States themselves and in municipal jurisdictions. But such a contention will not stand judicial scrutiny. The whole subject of the operation of such express companies has not been taken under direct national supervision, and Congress has not by any statute covered *the whole subject*. As Mr. Justice Harlan observes:

> "It should never be held that Congress intends to supersede, or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said—and the principle has been often reaffirmed—that in the application of this principle of supremacy of an Act of Congress in a case where a state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts could not be reconciled or consistently stand together."
>
> Reid *vs.* Colorado, 187 U. S., 137.

It cannot be claimed that there are any Federal statutes in any way touching the subject matter of these Ordinances, other than the Interstate Commerce Act, and, as that Act does not cover the same ground, and is not in any way inconsistent with the enforcement of the Ordinances, the latter retain their full vigor and validity as reasonable and very proper local police regulations, when applied to wagons employed in interstate commerce and their drivers.

III.

The ordinances are not a tax laid upon interstate commerce.

The provisions of the Ordinances specially applicable to express companies are set out in the Amended Bill (fols. 19, 29). In full they are embraced within

> Sections 300, 379, Chapter 7, Code of Ordinances of The City of New York (Cosby's).

They may be summarized as follows:

Each express wagon used in the express business within the City must be licensed, and the fee for such license is $5 (Secs. 305, 306 and 308).

Each driver of such wagon must be licensed, and pay a fee for such license of 50 cents, such license being obtained only upon the certificate of two reputable residents of the City testifying to the applicant's competency (Secs. 308 and 315).

Every public express wagon shall be marked with the word "Express," or the letters "Exp.," together with the figures of the official number (Sec. 331).

Every owner of a public express shall give a bond of $100, "conditioned for the safe and prompt delivery of all baggage, packages, parcels," etc. (sec. 332).

The licensee is required to exhibit his official license "upon the demand of any person" (sec. 375).

All words, etc., required "shall be shown permanently and conspicuously" (sec. 376).

All licensed vehicles and places of business "shall be regularly inspected" (sec. 374).

Provision is made for hearing complaints against licensees, and fines may be imposed for violation of the regulations (secs. 307, 378 and 379).

The license fees of $5 for each express wagon and of 50 cents for each driver thereof, therefore, are merely the necessary sums reasonably fixed to cover the ordinary and usual expenses of administration, supervision and inspection; and, as such, are sums collected in aid of the exercise of the *police powers* and are not an exercise of the *taxing power*. The distinction between licenses, and fees in connection therewith, exacted in the exercise of the police power, and license taxes, levied under the taxing power, has long been recognized.

West. Union Tel. Co. *vs.* New Hope, 187 U. S., 419;
Atl. & Pac. Tel. Co. *vs.* Philadelphia 190 U. S., 160;
Postal Tel. & Cable Co. *vs.* New Hope, 192 U. S., 55;
Postal Tel. & Cable Co. *vs.* Borough of Taylor, 192 U. S., 64;
Duluth Brew. & Malt. Co. *vs.* City of Superior, 123 Fed., 353, 358, 359;
Barrett *vs.* City of New York, 183 Fed., 796.

In the case at bar there is neither allegation nor proof, or offer of proof, that the license fees are excessive or unreasonable.

The contention of possible inconvenience or burden upon the express company in case each state or city should enact its own regulations, is fully met by the ruling of this Court in

New York, N. H. & H. R. Co. *vs.* New York, 165 U. S., 628,

wherein it was held that the remedy for such inconvenience lies in Congress alone, which could by its own regulations supersede those of the various states. So long as Congress remains inactive, the local regulations prevail, and inconveniences occasioned thereby cannot be deemed an unlawful burden upon interstate commerce.

IV.

The Ordinances are general, and not special, and make no unjust discriminations in violation of the Fourteenth Amendment.

The Ordinances cover and apply to all express wagons and all their drivers without exception. The whole of that class is covered, and no distinctions are made as to any in such class. Chief Judge Lacombe stated this proposition in a nutshell when he said:

> "It is sufficient to say that an ordinance "covering all instances of a certain class may "be a 'general' one, although it may not be "universally applicable to all classes."
>
> Barrett *vs.* City of New York, 183 Fed., at page 801.

It is also clear that the Ordinances do not make any unusual discriminations, nor deprive the Express Company of the equal protection of the laws in violation of the Fourteenth Amendment. A legislative body may classify occupations for the purpose of police regulation, and such classification, if not unreasonable or arbitrary, does not operate as a denial of the equal protection of the laws. "The State may distinguish, select and

classify objects of legislation and necessarily the power must have a wide range of discretion."

Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 283.

Orient Ins. Co. *vs.* Daggs, 172 U. S., 557.

Railway Co. *vs.* Mackay, 127 U. S., 204, 208.

Railway Co. *vs.* Beckwith, 129 U. S., 26.

This Court said in the

Orient Insurance Co. case, *supra*,

that a legislative classification suffices "if it is "practical, and is not reviewable unless palpably "arbitrary." The classification made by the Ordinances in question is a natural and scientific one. It is indicative of a business which everybody knows exists, and has existed, as a well marked and defined separate occupation, distinct from all other kinds of public carriers. It is, indeed, a very reasonable distinction for the purposes intended; and when all engaged in that particular occupation are included within the purview of the law or ordinance, the case does not fall within the constitutional inhibition.

V.

So much of the decree as is appealed from by the appellant, Barrett, should be affirmed, with costs.

Dated October 16, 1913.

Respectfully submitted,

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Supreme Court of the United States,

OCTOBER TERM, 1913.

EDWARD T. PLATT, as Treasurer of the United States Express Company, etc., Appellant, AGAINST THE CITY OF NEW YORK, *et al.*, Appellees.	No. 85.
THE CITY OF NEW YORK, *et al.*, Appellants, AGAINST EDWARD T. PLATT, as Treasurer of the United States Express Company, etc., Appellee.	No. 86.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF UNITED STATES EXPRESS COMPANY.

Statement.

This case was heard and determined in the court below with the case (hereinafter referred to as the Barrett case) of Barrett as President of the Adams Express Company against

the City of New York, *et al.* The Barrett case is on this court's docket as Nos. 83 and 84.

The stipulation herein (trans., p. 29) shows the character and extent of the business of the United States Express Company (over more than 32,000 miles of railroad), and shows that that business in New York City consists, with the exception of three-tenths of one per cent., of interstate and foreign commerce, and further shows that in all other respects the facts herein are substantially the same as in the Barrett case and provides that the case shall be heard and determined upon such stipulation and upon the evidence and stipulations in the Barrett case.

For more than fifty years an ordinance of the City of New York has been in effect providing for licensing and regulating many sorts of business, including the business of expressmen, and imposing license fees which are required to be paid over to the City Treasury (Barrett trans., p. 143). Such ordinance was never applied to the United States Express Company until November, 1910, when, in the midst of a strike of the drivers and other employees of that and other express companies, the City undertook to apply and enforce the ordinance as to such express companies and impounded their interstate wagons because unlicensed, arrested the drivers thereof because unlicensed, and refused special police protection to such wagons driven by unlicensed drivers (trans., pp. 22–24; Barrett trans., p. 145).

Thereupon this suit on behalf of the United States Express Company was brought to enjoin the enforcement of this ordinance because of its unconstitutional interference with interstate commerce.

The court below held that certain general provisions, so far as they purported to require a license as a prerequisite to conducting an interstate express business, were void, but the court upheld the specific provisions complained of, although they required licenses, imposed license fees and regulated the

conduct of expressmen (trans., pp. 45 *et seq.*). Thus the court denied the substantial relief sought by the complainant.

The ordinance in question is Chapter 7 of Part I of the Code of Ordinances. The most important sections are printed in full and an outline of the remainder of the ordinance is shown in the appendix (pp. I–VIII.).

The provisions of the ordinance throughout make it clear that its purpose is the supervision and regulation of certain kinds of business through the usual method of prohibiting the conduct of the business except upon an annual license which is subject to revocation by the Mayor and for which an annual license fee must be paid.

As to express companies, the most important provisions are as follows:

"Expressmen" are prohibited from carrying on business without such license (Sections 305, 306, 379), and the term "expressman" is so defined as to include an interstate express company (Section 330).

The annual license fees (but only one-half need be paid upon renewals) are $5 for each express wagon and 50 cents for each express driver (Section 308) and the license fees are to be paid into the City Treasury (Section 373).

No person may be licensed except a citizen of the United States or one who has declared intention to become a citizen (Section 307), and every application for an express driver's license must be endorsed in writing by two reputable residents of the City of New York testifying to the competence of the applicant, and the employment of unlicensed drivers is prohibited (Section 315).

Express wagons must be lettered and numbered so as to be identified (Sections 331, 376). Inspectors are provided to enforce the ordinance and inspect licensed vehicles and places of business (Section 374) and licenses must be exhibited to any person upon demand (Section 375).

Separate bond to the City with sureties approved by the Mayor or Chief of the Bureau of Licenses must be given for

each express wagon to insure safe delivery of goods (Section 332), rates for regular deliveries are prescribed, (Section 333), but there is no complaint that these rates are enforced as to interstate transportation; and all licensed expressmen are required to perform the public duties of the business (Section 375).

The United States Express Company contended that the purpose of the ordinance was to regulate the business relations between it and its customers; that its business was interstate business and was under the exclusive jurisdiction of Congress and therefore that the situation was controlled by the doctrine of *Crutcher vs. Kentucky*, 141 U. S., 47; and furthermore that Congress had regulated the business in the aspects dealt with by the ordinance and that that regulation was exclusive. The company pointed out that all the substantive provisions of the ordinance sought to accomplish purposes which, as to interstate express traffic, are dealt with by the Interstate Commerce Act, as is evidenced by the following comparison:

The Ordinance.	The Act of Congress.
As to Duty to Perform the Service.	
Every licensee (including expressmen) shall perform the public duties of the business licensed when called upon so to do" (Section 375).	Every carrier "shall provide and furnish such transportation upon reasonable request therefor" (Section 1).
As to Responsibility for the Service Performed.	
Every public express is required to give bond to the City of New York for the safe and prompt delivery of all packages, parcels, etc., entrusted to the owner or driver (Section 332).	Every carrier shall establish reasonable regulations and practices to secure the safe and prompt delivery of property * * * (Section 1). Any carrier shall be liable for damage caused by it or by any other carrier and may recover from the carrier on whose line the damage occurs Section 20).

To Prevent Unjust Charges.

Section 333 prescribes the legal rates for regular deliveries which shall prevail unless otherwise mutually agreed.	Rates shall be just and reasonable (Section 1); unjust discrimination (Section 2), and undue preference (Section 3) are prohibited; rates shall be published and observed (Section 6); the Commission may rescribe maximum rates (Section 15).

Method of Enforcement.

Primarily through the issue of a revocable license allowing the privilege of engaging in the business (Sections 300, 302–309).	The Act to regulate Commerce contains no such drastic method of enforcing the regulations of the Act.
Numerous provisions impose penalties for violations of the regulations prescribed.	Numerous provisions for penalties, and for civil proceedings.

The lower court held that a person engaged in conducting an interstate express could not be required to take out a local license as a prerequisite to conducting such business. Accordingly, the court enjoined the enforcement of Sections 305 and 306, which, merely as an introduction to the license scheme of the ordinance, provided in general terms that expressmen must be licensed.

But the court while holding that the primary purpose of the ordinance was "the licensing and otherwise regulating of certain specified businesses," nevertheless held that all the specific license provisions of the ordinance could be regarded as, incidentally, regulations as to the use of the streets, and that such regulations were separable and could be upheld even as to an interstate carrier. Thereupon the court upheld, as against the interstate express companies, the entire license scheme in all its practical effectiveness.

The court also upheld Section 332, requiring the giving of a bond for each licensed vehicle in the penal sum of $100 with

sufficient surety approved by the Mayor or Chief of the Bureau of Licenses conditioned for the safe and prompt delivery of parcels. The court held that this provision was "not to be condemned because it affects interstate commerce."

SPECIFICATION OF ERRORS.

The court erred in general in refusing to enjoin the license scheme of the ordinance. The specific errors which will be discussed in this brief are as follows:

The error committed by the court in holding that specific sections* of the ordinance were separable from the general provisions which were declared by the court to be in violation of the commerce clause of the Constitution of the United States.

The error committed by the court in holding that the specific sections just referred to were valid and not in violation of the commerce clause of the Constitution of the United States.

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* Sections 307, 308, 315, 330, 331, 332, 373, 374, 375, 376, 378 and 379 of Chapter 7 of Part I of Cosby's Code of Ordinances.

ARGUMENT.

There was no Basis for Separation Because the Various Specific Provisions Upheld Below Cannot be Regarded as Regulations as to the Use of the Streets.*

The provisions as to express wagons have no relation to the use of the streets. The ordinance does not regulate the character of the express wagons as to dimensions, weight, material, size of tire, motive power, condition of repair, or in any respect and it applies the term "express" to "every vehicle of whatever construction" (Section 330).

Nor does the ordinance deal with the manner in which express wagons shall use the streets. The license inspectors have no power except to see that the provisions of the ordinance are complied with and have no functions as to the use of the streets.

The object of the ordinance is to require the expressman to perform his public function, to make safe and prompt delivery of goods, and to observe the legal rates. The license, the lettering of the wagons, the inspection, and the power to revoke the license are all means to those ends, but none of them is a means to the end of regulating the use of the streets.

The provisions as to licensing the drivers of express wagons must stand or fall with the provisions as to licensing the wagons themselves, because no driver is required to have a license except a driver of a "licensed express." If the interstate express wagon need not be licensed, then its driver need not be licensed.

---

*Section 333 requiring bonds to insure delivery of goods is not claimed by the lower court to have any relation to the use of the streets and is discussed separately below.

The ordinance was passed under Section 51 of the Charter (see appendix, page I) designed to provide for the regulation of various *businesses* and a contrast of the ordinance and of this section of the Charter with Section 50 of the Charter and with the ordinance passed thereunder, Chapter 12 of Part I of the Code of Ordinances (see appendix, pages VI.–VIII.) designed to provide for the regulation of the use of the streets shows that the provisions of the license ordinance cannot properly be regarded as having a relation to the use of the streets.

The application of such license provisions to an interstate express company tends to interfere with the orderly conduct of interstate transportation and in fact caused very serious interference here. The court should not adopt a strained and unnatural construction and thereby create unnecessarily a basis for interfering with the conduct of interstate transportation.

The Various Specific Provisions Upheld Below, Even if They Could Be Regarded as Regulations as to the Use of the Streets, Are Not Separable From the Remainder of the Ordinance.

The lower court relied upon *Willcox vs. Consolidated Gas Company*, 212 U. S., 19, which declared "if the court can conclude it (the balance of the statute) would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good." But the court cannot so conclude in this case.

The lower court has held that the primary purpose cannot be accomplished and yet has upheld certain provisions on the ground that, although their primary purpose fails, they may be regarded as operating incidentally to promote another purpose which is within the power of the city. Such a view is opposed

to the true doctrine. Thus in *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362, 395, the court in upholding a portion of the statute showed that it effectuated "the prime object of the legislation." In *Haskell vs. Kansas Natural Gas Company*, 224 U. S., 217, 222, the court treated the entire statute as invalid as to foreign corporations, because its main and controlling purpose as to those corporations was unconstitutional, even though other provisions, if separately enacted, might have been valid.

The court should not impute unnecessarily to the city a purpose to adopt an unreasonable and unjust classification. But such imputation results from the action of the lower court, because that action establishes a license to regulate street use for a restricted class of vehicles although similar regulation is not applied to any other vehicles using the streets in the same manner. Where the purpose was to regulate the business a justifiable principle of classification permitted the restriction of the license regulation to vehicles employed by expressmen and cabmen. But if the purpose be to regulate street use, no such restriction is just or rational, and it is strikingly out of harmony with Section 50 of the Charter relating to the regulation of the use of the streets and prohibiting the passage of any special ordinances in relation thereto.

The taxation feature by itself would make this ordinance inseparable. The license fees imposed here, if they can be regarded as designed to cover the cost of inspection, must be regarded as having relation at least in great part to the regulation and supervision of business which the lower court indicates was the primary purpose of the ordinance, and which cannot be upheld as to the interstate carriers. Clearly a license fee would not be sustained, as against interstate carriers, which was designed in whole or in great part to cover the cost of an unconstitutional supervision and regulation of their business. This license tax upon the 343 wagons of the United States Express Company (trans., page 31) amounts

to $1,715 for the first year, plus a substantial additional amount for the necessary drivers. Even upon the theory of the lower court, it is apparent that in great part this imposition represents an unconstitutional burden, and it is impossible to separate it.

In dealing with local regulations affecting instrumentalities of interstate commerce, the court must weigh two important considerations—one, the interest of the people of the United States that their channels of interstate communication and transportation shall be unobstructed, and the other, the interest of the people of a given community that their local police necessities shall be met. It is highly important that the local communities themselves should be encouraged to adopt their local police regulations for the distinct and primary purpose of meeting legitimate local necessities and should be discouraged from reaching out toward more ambitious forms of regulation. But the course adopted by the lower court says in effect to local communities "adopt any ordinances you please to control interstate commerce and if you cannot coerce the interstate carriers into compliance we will reconstruct your ordinances for you so as to accomplish the maximum of what you could have done if you had proceeded within your powers."

But the License Provisions are an Unreasonable Burden upon Interstate Commerce Even if Relating to the Use of the Streets and Capable of Separation.

This proposition is approached with a full appreciation of the doctrine that State or municipal regulations to promote local police purposes may be upheld, although incidentally affecting instrumentalities of interstate commerce.

The Reasonableness of the Regulation is a Question for the Court and the Inquiry is Broader Under the Commerce Clause than Under the Fourteenth Amendment.

But such regulations must have "appropriate relation to the public convenience" and "not go beyond the necessities of the case"; the courts should "guard vigilantly against 'needless intrusion' upon the field committed by the Constitution to Congress"; and "the reasonableness or unreasonableness of a State enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority" (*Lake Shore & Michigan Southern Ry. Co. vs. Ohio*, 173 U. S., 285, 300, 301).

The court in determining whether a local regulation unduly encroaches upon the authority of Congress makes a broader and more searching inquiry than when considering whether a local regulation is in violation of the Fourteenth Amendment. Thus the Pennsylvania statute prohibiting the sale of oleomargarine was held not to be such an unreasonable exercise of legislative authority as to violate the Fourteenth Amendment (*Powell vs. Pennsylvania*, 127 U. S., 678), and nevertheless was held to be, as applied to interstate commerce, an unreasonable encroachment upon the authority of Congress, and this dis-

tinction was expressly pointed out (*Schollenberger vs. Pennsylvania*, 171 U. S., 1, 16).

Likewise, a statute requiring all intrastate passenger trains to be stopped at all county seats was held not to be unreasonable under the Fourteenth Amendment (*Gladson vs. Minnesota*, 166 U. S., 427), while a similar statute applied to interstate trains was held unreasonable under the commerce clause (*Cleveland, etc., Railway Co. vs. Illinois*, 177 U. S., 514). In the former case the court did not pass on the question of fact whether other trains afforded adequate facilities for the county seat involved, but in the latter case the court determined that question of fact.

In the light of these principles we contend that the provisions upheld by the lower court should be held to be an unreasonable burden upon interstate commerce even if relating to the use of the streets and capable of separation.

THE RELATION TO ANY LOCAL POLICE NECESSITY IS SO REMOTE AND FANCIFUL, AND THE INTERFERENCE WITH INTERSTATE COMMERCE SO DIRECT AND BURDENSOME, THAT THE REGULATIONS ARE UNREASONABLE AS TO INTERSTATE COMMERCE.

As express wagons these provisions have this operation: Wagons employed in interstate commerce and moving by way of the Hudson River Ferries between points in New York City and points in New Jersey (trans., p. 30) cannot be moved in New York City unless they have City licenses issued upon payment of substantial license fees and revocable at the discretion of the Mayor. The necessity or appropriateness of such a regulation for the promotion of safety in the use of the New York City streets is so remote as to be fanciful and yet the interference with interstate commerce may be substantial. Consequently the degree of undue encroachment upon interstate commerce becomes so great that the provision should be declared inoperative.

It is not believed that the courts would uphold an ordinance prohibiting any freight car moving in interstate commerce to be moved in the City of New York, even in the streets of the City, unless the car had a license issued by the City and revocable at the discretion of the Mayor. And yet that is not many degrees removed from the present situation where such an ordinance is applied to hundreds of wagons of the United States Express Company (most of them stabled in New Jersey) constantly plying between New York City and points in New Jersey (trans., pp. 30, 31).

The provision as to licenses for drivers of these wagons is open to similar criticism. Superficially the provision that the application for a driver's license shall be endorsed in writing by two residents of the City testifying to the applicant's competence may be regarded as having some bearing on safe driving. But the word "competence" is undefined and there is no provision for any inspection or regulation calculated to promote careful driving, so that the requirement can have no substantial relation to the promotion of safety, and is coupled with provisions which are unreasonable as to these interstate carriers.

The drivers of express wagons are not merely drivers, but are representatives of the express companies to deal with shippers and consignees. The drivers quote the rates prescribed under the Interstate Commerce Act and collect the charges which must be collected in accordance with that Act (Barrett trans., pp. 39, 57). Is it not a needless intrusion upon the domain of Congress for the City of New York to prohibit any man to act in this capacity until his undefined "competence" shall have been passed upon by its Bureau of Licenses?

Moreover, the ordinance admits of no proof of the question of "competence" except by residents of New York City. This requirement may be difficult at all times when the drivers and probably their superior officers live in New Jersey

and may become impracticable in times of strike when drivers qualified to discharge the duties may have to be brought from long distances. Thus the ordinance in its provisions as to licensing drivers has a very substantial tendency to delay the handling of interstate express traffic, and in the case of the strike out of which this litigation grew (Barrett trans., pp. 53, 70, 113) actually caused a great deal of such delay—and the avoidance of delay is the principal reason why the public employs the express service.

Again, by virtue of Section 307, no person can act in the City of New York as a driver for the United States Express Company unless he is a citizen of the United States or has declared his intention to become a citizen. Such a provision as to the status of persons who shall discharge these important functions of interstate express companies may or may not be desirable, but is not the subject one for action by Congress, rather than for separate action by every state and municipality?

The theory that the City of New York may, for the promotion of safety in the streets, prohibit the United States Express Company's drivers to act as such in the City without a local license rests upon the assumption that such local regulation is justified by the doctrine of *Smith vs. Alabama*, 124 U. S., 465, and *Nashville, etc., R. R. Co. vs. Alabama*, 128 U. S., 96. These cases uphold statutes dealing with specific phases of trainmen's competency obviously of great importance to the State and giving powers, very clearly circumscribed, to State boards to promote such phases of competency. It is a far cry from this definite and circumscribed State action, with an obvious and appropriate purpose, to the indefinite municipal regulation upheld below, with its inconclusive and fanciful relation to any legitimate local police object. Notwithstanding the cases just referred to, it is not believed this court would sanction the doctrine that municipalities throughout this country can prohibit interstate

locomotive engineers or train conductors from exercising their functions except after obtaining licenses issued by a local board upon showing by local testimony of their undefined competence.

THE REGULATIONS APPLY TO A VERY SMALL PART OF THE VEHICLES USING THE STREETS, AND THIS, UNDER THE FACTS OF THIS CASE, ESTABLISHES UNREASONABLENESS AS TO INTERSTATE COMMERCE.

A further reason why these regulations should be held inoperative as to interstate express carriers is that they have no application to the great majority of vehicles using the streets and that there are other regulations which do relate directly to the use of the streets and apply alike to all vehicles, including those of these carriers.

These facts are urged in this brief, not to establish a violation of the Fourteenth Amendment, but to show that the regulations are an unnecessary and unreasonable interference with the instrumentalities of interstate commerce and have no appropriate relation to the local police objects or to the local system actually employed to accomplish those objects.

The City, acting under section 50 of its Charter (Appendix, p. VI), has adopted an ordinance upon "Rules of the Road" (Appendix, pp. VII–VIII), and therein has made general regulations as to the method of driving vehicles, speed, lights, improper use of streets, use of sidewalks and general rules covering the use of streets, including a prohibition against overloading any vehicle, and has given full powers in the premises to the police department. These regulations apply to all vehicles. According to the lower court, the license regulations of Chapter 7 are additional regulations to promote safety in the streets but restricted to vehicles engaged in a very few businesses, and restricted to drivers of licensed hacks and expresses.

On the streets of New York City are several thousand horse-drawn vehicles other than express vehicles; this

class includes vehicles employed by department stores, brewers, warehousemen, iron makers, grocers, coal dealers, builders, contractors and manufacturers, and greatly exceeds the number of vehicles used by the express companies in interstate transportation, and the latter constitute no greater interference with traffic and no greater menace to pedestrians than the other vehicles referred to; the vehicles used by the express companies are in general similar in construction, size and weight to the other vehicles referred to, but the two-horse wagons used by the express companies are lighter and smaller than the brewery wagons or than the two-horse wagons used by coal dealers, iron makers, contractors, wholesale grocers and wholesale and retail dry goods concerns (Barrett trans., pp. 83–136).

The lower court said:

> "Inasmuch as all licensed vehicles are required to be conspicuously marked, a few hours' walk through the business thoroughfares of the city will give some idea of the relatively small number of vehicles which are within the terms of the ordinance. All carts and trucks used by wholesale dealers, by building contractors, breweries, department stores, and in a host of other employments—some of them of larger size, and a greater menace than any operated by public cartmen or expressmen—are wholly without the purview of this ordinance" (trans., p. 42).

The court, however, dismissed these facts on the idea that they did not involve any violation of the Fourteenth Amendment.

Entirely aside from the Fourteenth Amendment, these facts demonstrate that the license provisions are unreasonable as applied to the instrumentalities of interstate commerce, and have no natural or appropriate relation to the promotion of safety in the use of the streets. If the license provisions have a relation to promoting safe use of the streets, it

is inconceivable why they are not applied to the great majority of vehicles using the streets and why the comprehensive regulations as to use of the streets contain no such provisions.

If these license regulations should be upheld as reasonable street regulations, despite their application to only a small part of the vehicles and drivers on the streets, the result will be to encourage municipalities to interfere unduly with the instrumentalities of interstate commerce and with interstate commerce itself. On the other hand, if a municipality, in order to subject to local regulation the instrumentalities of interstate commerce must establish the appropriateness of the regulation by applying the same regulation to all other instrumentalities which are within the reason of the same rule, a much more carefully considered and rational scheme of regulation will result.

The Mayor's Power to Revoke Licenses Creates Under the Peculiar Circumstances Here an Unreasonable Burden Upon Interstate Commerce.

A further reason why the regulations should be held an unreasonable interference with interstate commerce is that they are inseparably tied to a power of revocation of all licenses by the Mayor in his discretion.

We make this point with full appreciation of the doctrine that where a municipal regulation requires a license or permit for an obviously appropriate local purpose, a power of revocation in the municipal authorities will not be regarded as arbitrary, but it will be assumed that the power will be used only in the exercise of a sound discretion for the purpose of promoting the objects of the regulation.

But the difficulty here is that the power of revocation is, of course, as broad as the ordinance. Certainly the Mayor can revoke the license for violation of any provision of the ordinance. For example, the decree below specifically approved Section 375 of the ordinance, which, among other things,

requires the licensee at all times to perform the public duties of the business licensed and Section 332 of the ordinance which requires bonds for the prompt delivery of parcels. If either of these provisions should be violated, doubtless the Mayor would feel justified in revoking the license. But both of these matters are directly regulated by the interstate commerce act. It cannot be permissible for the municipality of New York to undertake to enforce duties imposed by the interstate commerce act and to undertake enforcement through revocation of licenses, with the result of preventing citizens throughout the United States from enjoying interstate express service. Yet this result is involved in upholding this power of revocation.

We raise the question whether it can ever be reasonable for a municipality, even in matters of the most obviously local police character, to regulate instrumentalities of interstate transportation through a scheme of revocable licenses, because the revocation may mean the suspension of interstate transportation—a matter in which citizens of other States, who are in no sense represented by the municipal officers, have a vital interest. The vast interstate express business which starts or ends in the City of New York and in which the citizens of the entire United States are interested ought not, even for a period of a few days, to be subject to the practical veto power of an officer of that City.

But if a power of revocation can ever be regarded as reasonable in such cases, certainly the conferring of that power is a matter calling for much greater scrutiny by the courts than in cases where the sole question is as to whether such a power violates the Fourteenth Amendment. The power of revocation in this license ordinance, under the rulings of the lower court, vests in the Mayor of New York City a power of interference with interstate commerce without any standards restricting exercise of the power to those matters which, as to the interstate transportation involved, are within the jurisdiction of the City.

The Requirement of a Bond for Prompt Delivery of Interstate Shipments is an Unconstitutional Interference with Interstate Commerce.

Section 332 of the Ordinance provides:

> "Every owner of a public express shall give a bond to the City of New York for each and every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the Mayor or Chief of the Bureau of Licenses, conditioned for the safe and prompt delivery of all baggage, packages, parcels and other articles or things entrusted to the owner or driver of any such licensed express."

The lower court held this section to be "a legitimate exercise of the police power, which is not to be condemned because it affects interstate commerce" (trans., page 35).

This provision, however, as applied to the interstate vehicles of the United States Express Company is a regulation of a subject covered by the Interstate Commerce Act.

Section 1 of that Act requires carriers subject thereto to perform transportation upon reasonable request and to establish reasonable regulations and practices to secure the safe and prompt delivery of property. Upon the basis of the provisions of Section 1 of the Act this court has declared various State regulations to be inoperative, such as requirements that a carrier shall make delivery within a specified time (*Yazoo & Mississippi Valley R. R. Co. vs. Greenwood Grocery Co.*, 227 U. S., 1), and requirements that cars shall be furnished for shipment (*Hampton vs. St. Louis, Iron Mountain & Southern Ry. Co.*, 227 U. S., 456; *Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Farmers' Elevator Co.*, 226 U. S., 426).

Moreover, the "Carmack Amendment" in Section 20 of

the Act to Regulate Commerce " provides that any carrier receiving property for transportation shall issue a receipt therefor and shall be liable to the lawful holder for damage thereto caused by it or by any connecting carrier. In *Adams Express Co. vs. Croninger*, 226 U. S., 491, the court held that this legislation " supersedes all the regulations and policies of a particular State upon the same subject," and that the liability so declared could not be " increased or diminished by local regulation or local views of public policy " (pages 505, 506). In *Kansas City Southern Ry. Co. vs. Carl*, 227 U. S., 639, 649, the court said that the Carmack Amendment " undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore, withdrew them from the influence of state regulation." In the two cases just cited and in *M. K. & T. Ry. Co. vs. Harriman*, 227 U. S., 657, the court held that by virtue of the Carmack Amendment various state regulations affecting the liability of common carriers for goods transported ceased to have any operation as to interstate shipments.

If any considerable number of municipalities should follow this New York City requirement and exact with respect to every vehicle engaged in interstate transportation a bond for the safe delivery of property transported, there would be very serious embarrassment to interstate carriers, in addition to the confusion which would arise as to extent of liability and as to persons entitled to institute actions. All such local regulations should be regarded as superseded by the Federal legislation.

If Section 332 of the ordinance be valid as to interstate vehicles, then the Mayor would have the right to revoke any license for an interstate vehicle if he should be dissatisfied with the bond given on behalf of that vehicle.

There is no Basis for the View that the Duties of Interstate Express Companies to their Patrons can be Regulated by this Ordinance as an "Aid to Interstate Commerce."

This view was urged below and apparently influenced the lower court, especially as to Section 332 just discussed. The view is based upon cases upholding State regulations of which examples are found in *Western Union Telegraph Co. vs. James*, 162 U. S., 650 (requiring the diligent delivery of messages); *Atlantic Coast Line R. R. Co. vs. Mazursky*, 216 U. S., 122 (requiring prompt settlement of claims for loss or damage), and *Western Union Telegraph Co. vs. Orovo*, 220 U. S., 364 (requiring prompt transmission of messages).

There are three distinct and important reasons why there is no basis for the view that any part of this ordinance can be sustained on the authority of such cases as being "in aid of interstate commerce."

1. The cases which have upheld such state legislation have been cases where there was no Federal legislation on the subject. This distinction is pointed out and characterized as important in *Southern Railway Co. vs. Reid*, 222 U. S., 424, 436. Therefore, no part of this ordinance can be upheld as to interstate commerce upon the view that it is an "aid to interstate commerce" in insuring the proper performance of the duties of interstate express companies to their patrons. Those duties are dealt with by the Interstate Commerce Act.

2. In none of the cases upholding state legislation of this character has the legislation sought to effectuate this regulation through a scheme of licenses. A confusion of ideas is involved in the notion that a state or municipal regulation is "in aid of interstate commerce" when it proceeds upon the theory that interstate commerce will not be permitted unless state or municipal licenses shall be taken out. If the Georgia

statutes involved in the *James* case, *supra*, had required the telegraph companies to take out state licenses before sending interstate messages, such requirement would have violated the Federal Constitution, even though the purpose of the requirement might have been to insure the diligent delivery of messages.

3. In none of the cases upholding state legislation of this character was there any attempt to impose a license fee or any sort of tax in connection with the regulation. There is a confusion of ideas in the notion that a state or municipal regulation is "in aid of interstate commerce" when interstate commerce is taxed for the purpose of paying the expense of the "aid" thus forced upon the public. Both in the *James* case and in the *Mazursky* case, *supra*, the fact that no tax was imposed was referred to (162 U. S., 650, 661; 216 U. S. 122).

Conclusion.

It is submitted that the ordinance, because of its interference with interstate commerce, should be held void as to the United Stated Express Company and that the decree of the court below should be reversed in so far as it denied relief to the complainant.

For the sake of brevity this brief has been restricted to a few leading propositions. But in the opinion of counsel for the United States Express Company the additional points made in the brief on behalf of the Adams Express Company in the Barrett case constitute also valid reasons for such reversal of the lower court's decree.

WALKER D. HINES,
Of Counsel for United States Express Company.

New York, November, 1913.

APPENDIX.

Section 51 of the Greater New York Charter (as amended May 7, 1910, by Laws of 1910, Chap. 262, p. 465) is as follows:

Subject to the constitution and laws of the state, the board of aldermen shall have power to provide for the licensing and otherwise regulating the business of dirt carts, public cartmen, truckmen, hackmen, cabmen, expressmen, car-drivers and boatmen; of boot-blacks; of pawn-brokers, junk-dealers, keepers of intelligence offices, dealers in second-hand articles, hawkers, peddlers, vendors and scalpers in coal freights; of menageries, circuses and common shows; of shooting galleries, bowling alleys and billiard tables for hire; of bone boiling, fat rendering and other noxious businesses; and shall have power to regulate or forbid the keeping of dogs. The board of aldermen shall also have power to regulate the rates of fares to be taken by owners or drivers of hackney coaches, carriages, motors, automobiles or other vehicles, and to compel the owners thereof to pay annual license fees. All ordinances in relation to any of the matters mentioned in this section shall be general, shall provide for the enforcement thereof in the manner specified in section forty-four of this act as amended, and shall fix the license fees to be paid if any. All licenses shall be according to an established form, and shall be regularly numbered and duly registered as shall be prescribed by the board of aldermen.

The following is an outline of Chapter 7 of Part I of the Code of Ordinances of the City of New York (Cosby's Code of Ordinances, 1911, pp. 68–92)*, the most important provisions being quoted in full:

PART I.

General Ordinances and Ordinances of a General Character.

Chapter 7.

Title I.—Bureau of Licenses (Sections 300 to 304).

These sections provide for the Bureau of Licenses, for the form and manner of issuing licenses and for the recording thereof.

Title II.—The Granting and Regulation of Licenses.

Article I.—*Business requiring a license* (Sections 305 and 306).

§ 305. The following businesses must be duly licensed as herein provided, namely, public cartmen, truckmen, hackmen, cabmen, expressmen, drivers, junk dealers, dealers in second-hand articles, hawkers, peddlers, venders, ticket speculators, coal scalpers, common shows, shooting galleries, bowling alleys, billiard tables, dirt carts, exterior hoists and stands within stoop-lines and under the stairs of the elevated railroad stations (Ord. app. May 22, 1899, sec. 1).

§ 306. No person shall engage in or carry on any such business without a license therefor under a penalty of not less than two dollars, nor more than twenty-five dollars for each offense, and for the purposes of this ordinance the term person shall include any human being or lawful association of such (*Id.*, sec. 2).

Article II.—*Licenses and license fees* (Sections 307 to 309):

§ 307. All licenses shall be granted by authority of the Mayor and issued by the Bureau of Licenses for a term of one

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* Cosby's Code of Ordinances (1911) contains the ordinances of the City of New York in force January 1, 1911, and the provisions of Chapter 7 of Part I of Cosby's Code of Ordinances (1911) were in force in November, 1910, when the City attempted to enforce the ordinances involved in this case.

year from the date thereof, unless sooner suspended or revoked by the Mayor, and no person shall be licensed except a citizen of the United States or one who has regularly declared intention to become a citizen.

The Mayor shall have power to suspend or revoke any license or permit issued under the provisions of this ordinance. The Mayor shall also have power to impose a fine of not more than five dollars or less than one dollar for any violation of the regulations herein provided, and to suspend the license pending payment of such fine, which, when collected, shall be paid into the sinking fund for the redemption of the city debt (*Id.*, sec. 3).

SECTION 308. The annual license fees shall be as below enumerated:

* * * * * * *

For each express wagon..... $5.00

* * * * * * *

For each driver of any licensed vehicle..... .50

(*Id.*, sec. 4).

§ 309. Any license, before its expiration or within thirty days thereafter, may be renewed for another term, upon payment of one-half the license fee above designated therefor.

All licenses in force when this ordinance takes effect for any business enumerated above may be renewed under the foregoing provisions regulating renewals of licenses hereunder issued. (*Id.*, sec. 5).

Article III.—*Special regulations and rates.*

I. *Public carts and cartmen* (Sections 310 to 314).

II. *Drivers of licensed vehicles* (Section 315).

§ 315. Every person driving a licensed hack, or express, shall be licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable residents of The City of New York, testifying to the competence of the applicant. No owner of a licensed hack or express shall employ an unlicensed driver under a penalty of $10 for each and every offense. (Amend. app. June 29, 1909.)

III. *Public hacks and hackmen* (Sections 316 to 326).

IV. *Public hack stands* Sections 327 to 329).

IV*a*. *Public porters* (Sections 329*a* to 329*k*).

V. *Expresses and expressmen* (Sections 330 to 333).

§ 330. Every vehicle of whatever construction kept or used for the conveyance of baggage, packages, parcels and other articles within or through The City of New York for pay, shall be deemed a public express, and the owner thereof shall be deemed a public expressman, and the term express-

man shall be deemed to include any common carrier of baggage, packages, parcels or other articles within or through The City of New York. (Ord. app. May 22, 1899, sec. 18).

§ 331. Every public express shall show on each outside thereof the word "Express" or the letters "Exp." together with the figures of its official number. (*Id.*, sec. 19.)

§ 332. Every owner of a public express shall give a bond to The City of New York for each and every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the Mayor or Chief of the Bureau of Licenses, conditioned for the safe and prompt delivery of all baggage, packages, parcels and other articles or things entrusted to the owner or driver of any such licensed express. (*Id.*, sec. 20.)

§ 333. The legal rates for regular deliveries, unless otherwise mutually agreed, shall be as follows in the city:

Between points within any borough—

Not more than five miles apart, each piece	$0.40
Not more than ten miles apart, each piece	.55
Not more than fifteen miles apart, each piece	.75

Between points in different boroughs: One-half the above rates in additional.

Special deliveries at rates to be mutually agreed upon (*Id.*, sec. 21).

VI. *Junk dealers* (Sections 334 to 340)

VII. *Dealers in second-hand articles* (Sections 341 to 346)

VIII. *Peddlers* (Sections 347 and 348)

IX. *Ticket speculators* (Sections 349 and 350, Repealed).

X to XIV, Sections 351 to 355, relate to Coal Scalpers, Common Shows, Shooting Galleries, Bowling Alleys and Billiard Tables.

XV. *Dirt carts and cartmen* (Sections 356 and 357)

XVI. *Exterior hoists* (Sections 358 to 360)

Article IV. *Stands within the Stoop Lines and under Elevated Railroad Stations (Sections 361 to 372a)*

Title 3.—General Regulations and Complaints (Sections 373 to 378).

§ 373. All license fees received by the Bureau of Licenses shall be regularly paid over to the City Treasury, except the license fees received from hackmen, dealers in junk and second-hand articles, and for stands within stoop-lines, which shall be paid into the Sinking Funds for the Redemption of the City Debt. (Ord. app. May 22, 1899, sec. 56).

§ 374. The Mayor shall have power to appoint inspectors in the Bureau of Licenses to see that the provisions of this ordinance are fully and properly complied with; and all licensed

vehicles and places of business shall be regularly inspected, and the result of such inspection shall be indorsed on the official license therefor, together with the date of inspection and the signature of the inspector, and all inspections shall be regularly reported to the Bureau of Licenses. (*Id.*, sec. 57).

§ 375. Every licensee shall have the official license and exhibit the same upon the demand of any person; and shall report within three days to the Bureau of Licenses any change of residence or place of business; and shall at all times perform the public duties of the business licensed when called upon so to do, if not actually unable. (*Id.*, sec. 58).

§ 376. All words, letters and numbers hereinbefore prescribed for licensed vehicles shall be shown permanently and conspicuously on each outside thereof in colors contrasting strongly with background, and not less than two inches high, as directed and approved by the Mayor or Chief of the Bureau of Licenses, and shall be kept legible and plainly visible at all times during the term of the license; and shall be obliterated or erased upon change of ownership or expiration of the license; and no person shall have or use any vehicle with words, letters or numbers thereon like those herein prescribed for licensed vehicles without being duly licensed therefor. (*Id.*, sec. 59).

§ 377. Every licensed hackman, whenever with a hack or waiting for employment anywhere in The City of New York; every licensed peddler while peddling; every person while using a licensed junk cart or boat, and every licensed ticket speculator while acting as such, shall wear conspicuously on the left breast of the outer coat a metal badge, of a shape, size and style approved by the Mayor or Chief of the Bureau of Licenses, and furnished by said Bureau, having engraved or embossed thereon the official designation and number of the license, together with the words "New York City." (*Id.*, sec. 60).

§ 378. The Chief of the Bureau of Licenses, or Deputy Chief, shall have power to hear and determine complaints against licensees hereunder and impose a fine of not more than five dollars or less than one dollar for any violation of the regulations herein provided, subject to the approval of the Mayor, who shall have power to suspend the license pending payment of such fine. All such fines, when collected, shall be paid into the Sinking Fund for the Redemption of the City Debt. (*Id.*, sec. 61).

Title 4.—Violations. (Section 379).

§ 379. Except as hereinbefore otherwise provided, no person shall violate any of the regulations of this ordinance under a penalty of ten dollars for each offense. No such violation

shall be continued under a penalty of one dollar for each day so continued. Any person engaging in or carrying on any business herein regulated without a license therefor, or any person violating any of the regulations of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof by any magistrate, either upon confession of the party or competent testimony, may be fined not more than ten dollars for each offense, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid; but such imprisonment shall not exceed ten days. (*Id.*, sec. 62, as amended June 29, 1909).

Section 50 of the Greater New York Charter (as amended by Laws of 1905, Chapter 629, § 9, p. 1540) is as follows:

Subject to the constitution and laws of the state, the board of aldermen shall have power to regulate the use of streets and sidewalks by foot passengers, animals or vehicles; to regulate the speed at which vehicles shall be driven or ridden and at which vehicles shall be propelled in the streets; to regulate processions or parades occupying or marching upon any street; to prevent encroachment upon and obstructions to the streets and to authorize and require their removal by the proper officers; to regulate the opening of street surfaces for purposes authorized by law; to regulate the numbering of houses and lots in the streets and the naming of streets, except that it shall not be lawful to number or renumber any houses or to change the name of any street save between the first day of December in any year and the first day of May next ensuing; to regulate and prevent the throwing or depositing of ashes, garbage or other filth or rubbish of any kind upon the streets; to regulate the use of streets for signs, signposts, awnings, awning posts, horse-troughs, urinals, posts for telegraph or other electric wires, and other purposes; to regulate street pavements, crosswalks, curbstones, gutter-stones and sidewalks; to provide for regulating, grading, flagging, curbing, guttering and lighting the streets; to regulate public cries, advertising noises, steam whistles, and ringing bells in the streets; to regulate the exhibiting of banners, placards or flags in or across the streets from houses or other buildings; to regulate the exhibition of advertisements or hand-bills along the streets; and to make all such regulations in reference to the running of stages, omnibuses, trucks and cars as may be necessary for the convenient use and the accommodation of the streets, piers, wharves or stations. Whenever the word 'street' or the plural thereof occurs in this section it shall be deemed to include all that is included in the terms 'street, avenue, road, alley, lane,

highway, boulevard, concourse, public square and public place,' or the plurals thereof respectively. Wherever the word 'vehicle' or the plural thereof occurs in this section it shall be deemed to include wagons, trucks, carts, cabs, carriages, stages, omnibuses, motors, automobiles, locomotives, locomobiles, bicycles, tricycles, sleighs or other conveyances for persons or property. The board of aldermen shall not have power to authorize the placing or continuing of any encroachment or obstruction upon any street or side walk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same, nor shall they permit the erection of booths and stands within stoop lines, except for the sale of newspapers, periodicals, fruits and sodawater, and with the consent in such cases of the owner of the premises. The board of aldermen shall not pass any special ordinance in relation to any of the matters mentioned in this section. All ordinances in relation thereto shall be general ordinances which may either apply throughout the whole city or throughout specified portions thereof, and shall provide for the enforcement thereof as specified in section forty-four of this act as amended. Nothing herein contained shall be construed to prevent the board of aldermen from providing by special ordinance for the erection or maintenance on the streets or waters within The City of New York, of fountains, public comfort stations, urinals, public baths, or other like structures maintained by the public authorities; for the establishment of which the said board is hereby empowered to provide. All general ordinances relating to authorized structures, encroachments or obstructions in or upon the streets or sidewalks by persons other than the authorities of The City of New York, or other public authorities, shall fix a definite license fee for every such authorized structure, encroachment or obstruction, according to the character, extent and duration thereof, and shall provide for the issuing to an established form and shall be regularly numbered and duly registered as shall be prescribed by the board of aldermen. But no ordinance hereafter adopted or power hereafter exercised by the board of aldermen shall limit, apply to or affect any franchise, grant, contract or resolution in the nature of a franchise hereafter made, approved or authorized by the board of estimate and apportionment as in this act provided, or by the board of rapid transit railroad commissioners of The City of New York."

The following is an outline of Chapter 12 of Part I of the Code of Ordinances entitled "Rules of the Road." The headings of the articles and also the headings of the section are

taken from the ordinance (Cosby's Code of Ordinances, 1911, pp. 106–113).*

Article I.—*Method of driving vehicles* (Sections 435 to 453).
Article II.—*Speed* (Sections 454 to 457).
Article III.—*Lights* (Sections 458 and 459).
Article IV.—*Improper use of streets* (Sections 460 to 465).
Article V.—*Use of sidewalks* (Sections 466 to 469).
Article VI.—*General rule covering the use of streets* (Sections 470 and 471).
Article VII.—*Powers of Police Department* (Sections 472 and 473).
Article VIII.—*Definitions* (Section 474).

Among other definitions in this section is the following:

"Vehicle.—Every wagon, carriage, omnibus, sleigh, push-cart, bicycle, tricycle and other conveyance (except baby carriages), in whatever manner or by whatever force or power the same may be driven, ridden or propelled, which is or may be used for or adapted to pleasure riding or the transportation of passengers, baggage or merchandise upon the street; and every draught and riding animal, whether driven, ridden or led, excepting that an animal or animals attached to any vehicle shall, with such vehicle, constitute one vehicle. (*Id.*, art. VIII., sec. 1.)

Article IX. *Penalties for violation* (Section 475).

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* Cosby's Code of Ordinances (1911) contains the ordinances of the City of New York, in force January 1, 1911, and the provisions of Chapter 12 of Part I of Cosby's Code of Ordinances (1911) were in force in November, 1910, when the City attempted to enforce the ordinances involved in this case.

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M. B. Brown Printing & Binding Co., 49-57 Park Place, N. Y.
(15235)

Office Supreme Court, U. S.
FILED
NOV 8 1913
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1911.

Edward T. Platt, as Treasurer of the United States Express Company, etc., Appellant.
vs.
The City of New York *et al.*

No. 85.

Brief of Defendants.

The questions involved in this appeal are similar in all respects to those which are discussed in our Brief in

William M. Barrett, as President of the Adams Express Company, &c., *vs.* The City of New York *et al.*,

which is No. 83 on the present calendar. As stated by Lacombe, *C. J.*, in the Court below (at page 36),

> "The situation of each company is substantially the same as that of the others, and the discussion of the cases will be simplified if it be confined to the facts shown in the case first above entitled," i. e., the Adams Express Co. case.

For that reason we submit this appeal on our Brief in the Adams Express Co. case, and, for the

reasons which we there urge, we ask that the judgment, so far as the Complainants' appeal is concerned, be affirmed.

Dated New York, November 5, 1913.

Respectfully submitted,

ARCHIBALD R. WATSON,
Corporation Counsel,
Attorney for Defendants.

ARCHIBALD R. WATSON,
TERENCE FARLEY,
of Counsel.

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M. B. Brown Printing & Binding Co., 49-57 Park Place, N. Y.
(15225)

Office Supreme Court, U. S.
FILED
NOV 8 1913
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CLERK

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE CITY OF NEW YORK *et al.*,
Appellants,
against
EDWARD T. PLATT, as Treasurer of the United States Express Company, etc.

No. 86.

Brief of Appellants.

The questions involved in this appeal are similar, in all respects, to those which we discuss in our Brief in

The City of New York *et al. vs.* William M. Barrett, as President of the Adams Express Co., etc.

which is No. 84 on the present Calendar. For the reasons therein urged we ask that the Decree in this suit, in so far as it awards any relief to the Complainants, be reversed and the Bill of Complaint be dismissed on the merits.

Dated November 6, 1913.

Respectfully submitted,

ARCHIBALD R. WATSON,
Corporation Counsel,
Attorney for Appellants.

ARCHIBALD R. WATSON,
TERENCE FARLEY,
of Counsel.